General Report

Union Citizenship:

Development, Impact and Challenges

The XXVI FIDE Congress in Copenhagen, 2014
Congress Publications Vol. 2

Editors: Ulla Neergaard,
Catherine Jacqueson & Nina Holst-Christensen

Kammeradvokaten
Law Firm Poul Schmith

Legal Adviser to the Danish Government

www.en.kammeradvokaten.dk/eu

Union Citizenship:

Development, Impact, and Challenges

Union Citizenship:

Development, Impact, and Challenges

Unionsbürgerschaft:

Entwicklung, Auswirkungen und Herausforderungen

La citoyenneté de l'Union :

Développement, impact et défis

The XXVI FIDE Congress in Copenhagen 2014
Congress Publications Vol. 2

Editors: Ulla Neergaard, Catherine Jacqueson, Nina Holst-Christensen
General Rapporteurs: Niamh Nic Shuibhne and Jo Shaw

DJØF Publishing
Copenhagen 2014

Editors: Ulla Neergaard, Catherine Jacqueson, Nina Holst-Christensen
Union Citizenship: Development, Impact, and Challenges

1. edition

Cover: Thea Nisted Svendsen
Print: Toptryk Grafisk, Gråsten

Jacket illustration: The main building of the University of Copenhagen;
gouache from about 1860 by Peder Christian Rosengreen.
Owner and photo: University of Copenhagen. The XXVI FIDE Congress
Copenhagen 2014 was hosted by the Danish Association for European Law
in cooperation with the Faculty of Law, University of Copenhagen.
One of the social events took place in the main building pictured on the cover.

Printed in Denmark 2014
ISBN 978-87-574-2923-7

Published with the support of
dreyersfond

die vorliegenden Bände stellen dies unter Beweis. Wir wünschen uns, dass sowohl die FIDE als auch die Kongresse in Zukunft erfolgreich fortgeführt und weiterentwickelt werden können.

FIDE 2014

Questionnaire General Topic 2

Union Citizenship: Development, Impact and Challenges

Niamh Nic Shuibhne and Jo Shaw [1]

General Introduction

Union citizenship stands at the interface of integration and constitutionalism, and is a barometer for key trends and influences at the current crossroads between the Member States and the European Union. The purpose of this questionnaire is to stimulate national reports that enable us to understand better, as a primary objective, how the rights attached to Union citizenship are developing and being applied within the legal orders of the Member States. To achieve that objective, we are interested, in the first instance, in examples that demonstrate how national legislatures, administrations and judiciaries are interpreting and applying the aspects of EU citizenship that require implementation at the national level, but we are also keen to gather evidence on how those actors are responding to case law of the Court of Justice relating to citizenship rights that sit outside the parameters of direct national implementation.

Analysis of this rich empirical data will also enable us to present a comparative perspective on the development of EU citizenship rights. Most situations involving the application of EU legal rights happen at national level, and never reach the EU institutions at all. The EUDO Citizenship Observatory and its existing datasets on the acquisition and loss of citizenship and more recently on electoral rights[2] have started to fill a crucial information gap in this context; but cross-tabulation of that data with the national reports pre-

1. University of Edinburgh. All three questionnaires have originally been elaborated in English, and subsequently translated into French and German. Therefore, in case of any discrepancies, it is the English versions which best represent the thinking of the General Rapporteurs.
2. *See* http://eudo-citizenship.eu/databases.

pared for the FIDE Congress will enhance the available material, and thus our understanding of the *reality* of Union citizenship, very significantly.

As a secondary objective, however, we are also keen to get a greater sense of how Union citizenship is developing within and/or impacting upon the *culture* of national citizenship. For example, how are EU citizenship rights being portrayed by the national media and in popular or civil society discourse? Media actors have an extraordinary platform from which to shape the tone of national debate; have they acted responsibly (e.g. by providing accurate information on the applicable rights) in the specific context of Union citizenship? How is civil society discourse (e.g. as emerging through blogs and websites) responding to that steer? More generally, how does EU free movement law, and the citizenship rights associated with it, sit alongside national *immigration* law? In addition, where the interface between national citizenship and EU citizenship is concerned, issues may also be raised about the rights that *static* EU citizens have, or do not have, and how this affects the perception of EU citizenship and those who hold the rights of *mobile* citizens.

The span of Union citizenship and associated rights covers a potentially enormous field and we have, therefore, decided to focus on four key, *citizen-specific* themes in the questionnaire. What we are seeking to understand is how national actors are interpreting and applying the *added-value* rights of Union citizenship i.e. rights beyond those attached to more established free movement categories, such as workers. Our four selected themes are:

A. Citizenship within Directive 2004/38/EC[3]
B. Citizenship beyond Directive 2004/38/EC
C. The political rights of EU citizens
D. The emerging culture(s) of citizenship.

By focusing on these distinct, yet interrelated elements of the development and impact of Union citizenship, we aim in our General Report to offer a cross section of insights into how EU citizenship has (or has not) become embedded into the national constitutional, legal and political cultures. We also intend to identify key challenges affecting the realisation of Union citizenship within the Member States.

3. Directive 2004/38/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77.

Guide to Answering Questions

Please endeavour to answer questions in a manner that:

– Provides information in a way that is accessible to a range of national audiences (i.e. explaining national issues in their proper context) and which is comparable across Member States; and
– Is evidence-based and objective: we are interested in receiving examples, rather than a comprehensive account of national legal issues (beyond the scope of a single report), and examples objectively stated will offer much more important comparative data than the views of a particular commentator. Nevertheless, of course, if it is necessary to make a judgment about whether or not EU law is effectively implemented at the national level, this should be included.

Moreover, Rapporteurs are kindly requested, whenever appropriate, to include in their reports information on the position taken on the relevant legal issues by:

– Courts and tribunals in their case law in the relevant jurisdiction;
– Executives and parliaments in the Member State described;
– Academic and professional literature in the relevant Member State; and
– The media in the relevant Member State.

Themes and questions

A. Questions 1-6: Citizenship *within* Directive 2004/38/EC – Stability of Residence for Union Citizens and their Family Members

The adoption of Directive 2004/38/EC was a significant milestone in the regulation of Union citizenship. In particular, it was anticipated that the application of EU citizenship rights by national administrations, legislatures, and judiciaries would be considerably improved by the existence of this detailed framework text. But has this happened in reality? In this section of the questionnaire, we have developed a series of questions that engage with the citizenship-specific elements of the Directive against a thematic concern about *stability* of residence for EU citizens and their family members. The questions address: (1) the evolving definition of family members and relationships of dependency; (2) the potential challenge to residence stability generated by

the Directive's economic self-sufficiency conditions; (3) the ground-breaking creation of *direct* EU legal rights for the family members of Union citizens, including third country national family members; (4) the similarly revolutionary concept and status of 'permanent residence'; (5) the express temporal limitations placed on access to certain social security benefits; and (6) against the backdrop of surprisingly moderate recent guidance from the Court of Justice, and also considering the extent to which Member State authorities are considering and applying the Directive's 'softening' criteria when taking decisions about the expulsion of Union citizens or their family members, the legislatively intended distinctions between different groups of Union citizens in the context of expulsion.

1. With respect to a Union citizen's family members, how have Articles 2, 3, and 5 of the Directive been transposed into national law? How have national courts and/or tribunals dealt with the different types of family relationships outlined in Articles 2 and 3? Are the procedural safeguards contained in Article 5 providing *effective* protection?
2. Is there any evidence of the expulsion of EU citizens (and/or their family members) on purely economic grounds (i.e. failure to satisfy the conditions set out in Article 7 of the Directive) e.g. in the decisions of national courts and/or tribunals?
3. How have Articles 12-15 of the Directive been transposed into national law? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?
4. How have Articles 16-21 of the Directive been transposed into national law? Has data on the volume of applications to date for the status of permanent residence been published for your Member State? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?
5. How has Article 24(2) of the Directive been transposed into national law? Does national law distinguish between the categories specified in Article 24(2) and job-seekers in terms of entitlement to social benefits? Has Article 24(2) displaced the Court of Justice's 'real link' case law before national courts or tribunals?[4]

4. *Compare* e.g. the 'real link' approach applied in Case C-209/03, *Bidar v London Borough of Ealing; Secretary of State for Education and Skills*, Judgment of the Court (Grand Chamber) of 15 March 2005, with the subsequent decision in Case C-158/07, *Förster v IB-Groep*, Judgment of the Court (Grand Chamber) of 18 November 2008; and, in the context of job-seekers, Case C-138/02, *Collins v Secretary of*

6. Please describe how the national courts and tribunals have understood, applied and differentiated between the concepts of 'public policy, public security, or public health' (Article 27), 'serious grounds of public policy or public security', and 'imperative grounds of public security' (Article 28).[5] How has the principle of proportionality been understood and applied in these contexts? How have the national courts and tribunals taken account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State, and the extent of his/her links with the country of origin?

B. Questions 7-8: EU Citizenship *beyond* Directive 2004/38/EC – Exploring National Application of Primary EU Law

Thinking especially of the decisions in recent case law such as *Rottmann* and *Ruiz Zambrano*,[6] it is clear that the adoption of Directive 2004/38 has not altogether curtailed the interpretative powers of the Court of Justice with respect to the primary citizenship rights conferred directly by the Treaties. In this section of the questionnaire, our questions are constructed to elicit information about the extent to which national authorities are responding to that jurisprudence and are willing to go beyond the boundaries of the Directive. We highlight two key areas in this respect: (1) 'purely internal situations' and the issue of reverse discrimination, especially in cases involving the rights of family members; and (2) the extent to which national rules on the acquisition and loss of citizenship accommodate, or otherwise, the specific implications of those rules for acquisition and/or loss of the status of Union citizenship.

State for Work and Pensions, Judgement of the Court (Full Court) of 23 March 2004 with Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, Judgment of the Court (Third Chamber) of 4 June 2009.

5. *See* e.g. Case C-145/09, *Land Baden-Württemberg v Panagiotis Tsakouridis*, Judgment of the Court (Grand Chamber) of 23 November 23 2010 and Case C-348/09, *P.I. v Oberbürgermeisterin der Stadt Remscheid*, Judgment of the Court (Grand Chamber) of 6 March 2012.
6. *See* Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2nd March 2010; and Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, Judgment of the Court (Grand Chamber) of 8 March 2011.

7. To what extent do national courts and tribunals tend to reject arguments based on EU citizenship rights on the grounds that the dispute involves a 'purely internal situation'? To what extent has the Court of Justice's case law grounded directly on the TFEU's citizenship provisions (e.g. *Chen*,[7] *Ruiz Zambrano*, and subsequent decisions) been effectively implemented and applied at the national level? Does national case law distinguish clearly between rights acquired under Directive 2004/38 and under Articles 20 and/or 21 TFEU when EU citizens are seeking family reunification rights from their home Member States?[8] Have legislative or specific administrative changes been put in place? How are these matters being dealt with by the national courts?
8. In the context of the judgment in *Rottmann*, to what extent do rules on the acquisition and/or loss of national citizenship reflect the implications of the particular requirements of EU citizenship? Please consider the EUDO Citizenship Observatory data on acquisition and loss of citizenship in answering this question.

C. Questions 9-12: Political Rights of EU Citizens

Notwithstanding the emphasis in the Lisbon Treaty on the participatory and representative nature of democracy in the Union legal order, the Member States continue to lag behind the vision spelled out in the EU Treaties and by the EU legislature with respect to the realisation of appropriate electoral rights for Union citizens. This set of questions examines: (1) the implementation of Directive 93/109/EC[9] on European Parliament elections; (2) the implementation of Directive 94/80/EC[10] on local elections; (3) the extent to which EU citizens residing in the country are granted electoral rights for re-

7. Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department*, Judgment of the Court (Full Court) of 19 October 2004.
8. *See* Case C-434/09 *McCarthy v Secretary of State for the Home Department*, Judgment of the Court (Third Chamber) of 5 May 2011; Case C-256/11 *Dereci and others v Bundesministerium für Inneres*, Judgment of the Court (Grand Chamber) of 15 November 2011.
9. Directive 93/109/EC, laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] OJ L 329/34.
10. Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L 368/38.

gional and other elections under national law i.e. above and beyond the threshold requirements set out in the EU Treaties; and (4) national restrictions imposed on access to the electoral rights applied to Union citizens, including those imposed on their own citizens which may be affected by EU law.

9. Since when has Directive 93/109/EC on European Parliament elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts? What additional changes will be required by the December 2012 amendments to Directive 93/109/EC.[11]
10. Since when has Directive 94/80/EC on local elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts?
11. Briefly report on regional and other elections in which EU citizens residing in the country are granted electoral rights under national law. Is there a franchise for EU citizens that goes beyond the local and EP electoral rights required under EU law? What have been the reasons for extending such rights specifically to EU citizens?
12. Are there any specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise (e.g. in relation to the voting rights of persons convicted of criminal offences or persons with mental impairments)? In answering this question, rapporteurs may be interested to know about an emerging line of case law in the UK on the application of EU law, specifically Article 39 CFR, to restrictions on prisoners' voting, which will reach the UK Supreme Court in June 2013.[12]

11. An amending directive was adopted on 20 December 2012 by the Council of Ministers, but has yet to be published in the OJ (Council Document 17198/12, 19 December 2012).
12. The Scottish case of *McGeoch v Lord President of the Council* [2011] CSIH 67 and the English case of *Chester v Secretary of State for Justice* [2010] EWCA Civ 1439 have been conjoined and will be heard together in the Supreme Court in June 2013. In both cases, the applicants will argue that the total ban on prisoners' voting rights in the UK in relation to the prospective European Parliament elections in June 2014 is disproportionate.

Please consider the EUDO Citizenship Observatory (FRACIT) data, especially the relevant national reports, in answering these questions.

D. Questions 13-15: Culture(s) of Citizenship

We intend to chart the emerging *cultures* of (Union) citizenship in three key respects: (1) the status of Union citizenship is constructed around the paradigm of individual *rights*; but immigration law more generally is traditionally grounded in an ethos of *permission* – do national actors (administrative, legislative; and judicial) tend to apply that distinction *appropriately* in their application and interpretation of Union citizenship? (2) To what extent has the culture of rights been strengthened by the changed legal status of the Charter of Fundamental Rights? Are rights-based arguments intensifying, in other words, since the Lisbon Treaty came into effect in 2009? (3) What is the general *tone* of the national debate, in the media and civil society more broadly, on the status of and the rights attached to Union citizenship?

13. On the basis of your findings from the above questions, do you consider that the implementation of EU citizenship in your Member State is understood at the national level as part of a rights-based EU 'free movement' and 'constitutional' culture, or as an adjunct to national immigration systems based on 'permissions' to non-nationals to be present in the territory?
14. Has the binding effect of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty in 2009, played any role in how the rights of EU citizens are being interpreted by the national courts and/or tribunals?
15. Please describe the extent to which issues connected to EU citizenship have been a salient issue in the national media and how this issue has been dealt with in the national media. Are there any particularly dominant themes within media reporting (e.g. expulsion; access to state benefits; derived rights for third country nationals)? How *accurate* is national reporting of EU citizenship issues? Can you detect evidence of the influence of the media on national public discourse?

FIDE 2014

Questionnaire du thème général 2

La citoyenneté de l'Union : développement, impact et défis

Niamh Nic Shuibhne et Jo Shaw [1]

Introduction générale

La citoyenneté de l'Union se trouve à l'intersection entre l'intégration et le constitutionnalisme, et elle reflète les principales tendances à la croisée entre les Etats membres et l'Union européenne. Le but de ce questionnaire est d'encourager l'élaboration de rapports nationaux qui nous permettent de mieux comprendre, en tant qu'objectif prioritaire, comment les droits liés à la citoyenneté européenne se développent et sont appliqués dans les différents ordres juridiques des Etats membres. Pour réaliser cet objectif, nous nous intéressons d'abord aux exemples qui montrent comment les législations, les administrations et les autorités judiciaires nationales ont interprété et appliqué les aspects de la citoyenneté européenne qui exigent une transposition au niveau national ; en outre, nous cherchons à recueillir des preuves sur la manière dont ces acteurs apportent une réponse à la jurisprudence de la Cour de Justice relative aux droits des citoyens qui ne sont pas couverts par les paramètres de transposition directe au niveau national.

L'analyse de ces données empiriques nombreuses nous permettra également de présenter une perspective comparative sur le développement des droits de la citoyenneté européenne. La plupart des situations qui impliquent une application des droits de l'UE sont examinées au niveau national, sans jamais atteindre les institutions européennes. L'observatoire EUDO de la citoyenneté et ses ensembles de données sur l'acquisition et la perte de la ci-

1. Université d'Edinburgh. Les trois questionnaires ont été initialement rédigés en anglais, puis ils ont été traduits en français et en allemand. En cas de divergence, veuillez vous reporter aux versions anglaises qui représentent mieux la pensée des rapporteurs généraux.

toyenneté, et plus récemment sur les droits électoraux[2] ont commencé à combler le manque significatif d'informations dans ce domaine ; mais un recoupement de ces données avec les rapports nationaux élaborés par le Congrès de la FIDE pourrait enrichir considérablement les informations déjà disponibles et nous permettre ainsi de bien mieux cerner la *réalité* de la citoyenneté de l'Union.

Notre deuxième objectif est de mieux percevoir la manière dont la citoyenneté de l'Union se développe et/ou influe sur la *culture* de la citoyenneté nationale. Par exemple, de quelle manière les droits de la citoyenneté européenne sont-ils décrits dans les médias nationaux, dans les débats publics et les discours de la société civile ? Les acteurs du monde des médias ont une extraordinaire plate-forme pour modeler le ton du débat public ; en ont-ils usé de manière responsable (notamment en fournissant des informations précises sur les droits en vigueur) sur le thème de la citoyenneté de l'Union ? Quel est le discours de la société civile (tel qu'il apparaît dans les blogs et les sites web, par exemple) en réponse à cette sollicitation ? De manière plus générale, comment la législation européenne en matière de libre circulation, et les droits du citoyen qui y sont associés, côtoient la législation nationale sur *l'immigration* ? Nous chercherons en outre à distinguer, dans l'interface entre la citoyenneté nationale et la citoyenneté européenne, quels sont les droits que les citoyens européens *statiques* possèdent, ou ne possèdent pas, et dans quelle mesure cela peut-il influer sur la perception de la citoyenneté européenne, et la perception de ceux qui exercent leur doit de libre circulation.

L'étendue de la citoyenneté de l'Union et des droits qui lui sont associés couvrant un champ de possibilités énorme, nous avons décidé de nous recentrer sur quatre thèmes principaux *spécifiques au citoyen* dans ce questionnaire. Nous essayons de comprendre comment des acteurs nationaux interprètent et appliquent les droits à *valeur ajoutée* que sont les droits de la citoyenneté de l'Union, dans la mesure où ils s'ajoutent à ceux qui sont liés aux catégories de libre circulation mieux établies comme celle des travailleurs. Les quatre thèmes sélectionnés sont les suivants :

A. La citoyenneté dans le cadre la directive 2004/38/CE[3]
B. La citoyenneté au-delà des dispositions de la directive 2004/38/CE

2. *Consulter le site* http://eudo-citizenship.eu/databases.
3. La directive 2004/38/CE relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des Etats membres, [2004] JO L158/77.

C. Les droits politiques des citoyens européens
D. L'émergence d'une ou plusieurs cultures de la citoyenneté

En mettant l'accent sur ces éléments distincts mais interdépendants du développement et de l'influence de la citoyenneté de l'Union, nous souhaitons offrir un éventail représentatif des perceptions sur la manière dont la citoyenneté européenne a (ou n'a pas) trouvé d'ancrage dans les cultures constitutionnelles, légales et politiques au niveau national. Nous avons également l'intention d'identifier les principaux défis qui pèsent sur la prise de conscience de la citoyenneté de l'Union dans les Etats membres.

Lignes directrices pour répondre aux questions

Pour répondre au mieux aux questions, nous vous invitons à suivre les lignes directrices suivantes :

– Fournir des informations de manière à ce qu'elles puissent être accessibles à un large éventail de publics nationaux (notamment en expliquant les problèmes nationaux dans leur contexte), et de manière à ce qu'elles soient comparables avec celles d'autres Etats membres.
– Les réponses doivent reposer sur des éléments concrets et objectifs : nous souhaitons obtenir des exemples plutôt qu'un compte-rendu exhaustif des problèmes juridiques nationaux (qui dépassent le propos d'un simple rapport), et des exemples exposés objectivement offrent bien plus de données comparatives importantes que l'opinion personnelle d'un commentateur. Néanmoins, bien sûr, il pourra s'avérer nécessaire de porter un jugement sur la transposition effective ou non du droit européen au niveau national, et de l'inclure dans ce questionnaire.

Nous demandons en outre aux rapporteurs de bien vouloir inclure, chaque fois que cela s'avère opportun, des informations dans leur rapport sur la position prise sur les différentes questions juridiques par :

– les cours et tribunaux dans leur jurisprudence, pour la juridiction concernée
– l'exécutif et le parlement dans l'Etat membre décrit
– la doctrine de l'Etat membre en question
– les médias dans l'Etat membre en question

Thèmes et questions

A. Questions 1 à 6 : La citoyenneté *dans* le cadre de la directive 2004/38/CE – La stabilité de résidence des citoyens de l'Union et des membres de leurs familles

L'adoption de la directive 2004/38/CE a été une étape importante dans la réglementation de la citoyenneté de l'Union. Il était notamment prévu que l'application des droits de citoyenneté européens par les administrations, les législations et les autorités judiciaires serait nettement facilitée par l'existence de cette directive-cadre détaillée. Mais cela s'est-il réellement produit ? Dans cette partie du questionnaire, nous avons élaboré une série de questions concernant les éléments spécifiques à la citoyenneté dans la directive, en rapport avec une approche thématique : *la stabilité* de résidence pour les citoyens européens et les membres de leur famille. Les questions abordent : (1) l'évolution de la notion de membres de la famille et de la notion de relations de dépendance ; (2) le problème que risque de poser la notion de stabilité de résidence, suscité par les conditions d'autosuffisance économique stipulées dans la directive ; (3) la création sans précédent de droits juridiques européens *directs* pour les membres de la famille des citoyens de l'Union, dont les membres de la famille ressortissants de pays tiers ; (4) de même, le concept et statut révolutionnaire de la notion 'droit de séjour permanent'; (5) les limitations temporelles explicites pour accéder à certaines prestations de sécurité sociale ; et (6) compte tenu des orientations récentes et étonnamment tièdes de la Cour de Justice, et de la manière dont les autorités des Etats membres considèrent et appliquent les conditions d'assouplissement de la directive lorsqu'elles prennent des décisions d'expulsion envers les citoyens de l'Union ou les membres de leur famille, les distinctions prévues par la législation entre les différents groupes de citoyens de l'Union dans le cadre des expulsions.

1. En ce qui concerne les membres de la famille d'un citoyen de l'Union, comment les articles 2, 3 et 5 de la directive ont-ils été transposés en droit national ? Comment les cours et/ou les tribunaux nationaux ont-ils abordé les différents types de relations familiales décrites dans les articles 2 et 3 ? Les garanties procédurales décrites à l'article 5 fournissent-elles une protection *efficace* ?
2. Existe-t-il des éléments de preuve de l'expulsion de citoyens européens (et/ou des membres de leur famille) pour des motifs purement économiques (c'est-à-dire en raison de la non-satisfaction des conditions fixées à

l'article 7 de la directive), suite notamment à des décisions des cours et/ou des tribunaux nationaux ?

3. Comment les articles 12 à 15 de la directive ont-ils été transposés en droit national ? Des différends sur l'interprétation ou l'application de ces dispositions ont-ils été portés devant les cours ou tribunaux nationaux ?
4. Comment les articles 16 à 21 de la directive ont-ils été transposés en droit national ? Des données sur le volume des demandes concernant le statut de résident permanent ont-elles été publiées à ce jour dans votre Etat membre ? Des différends sur l'interprétation ou l'application de ces dispositions ont-ils été portés devant les cours ou tribunaux nationaux ?
5. Comment l'article 24(2) de la directive a-t-il été transposé en droit national ? Le droit national fait-il une distinction entre les catégories décrites à l'article 24(2) et les demandeurs d'emploi en ce qui concerne le droit aux prestations sociales ? L'article 24(2) a-t-il remplacé la jurisprudence relative au 'lien réel' de la Cour de Justice devant les cours et tribunaux nationaux ?[4]
6. Veuillez décrire comment les cours et tribunaux nationaux ont compris, appliqué et établi une distinction entre les notions « d'ordre public, de sécurité publique ou de santé publique » (article 27), « des motifs graves d'ordre public ou de sécurité publique » et « des raisons impérieuses de sécurité publique » (article 28).[5] Comment le principe de proportionnalité a-t-il été compris et appliqué dans ces différents cas ? De quelle manière les cours et tribunaux nationaux ont-ils tenu compte des considérations liées à la durée de séjour de la personne concernée sur son territoire, de son âge, son état de santé, sa famille et sa situation économique, son intégration sociale et culturelle dans l'Etat membre d'accueil, et l'étendue de ses liens avec le pays d'origine ?

---

4. *Comparer* notamment l'approche du 'lien réel' utilisée dans l'affaire C-209/03, *Bidar contre London Borough of Ealing et Secretary of State for Education and Skills*, Arrêt de la Cour (grande chambre) du 15 mars 2005, avec la décision ultérieure dans l'affaire C-158/07, *Förster v IB-Groep*, Arrêt de la Cour (grande chambre) du 18 novembre 2008 ; et, dans le domaine des demandeurs d'emploi, l'affaire C-138/02, *Collins contre Secretary of State for Work and Pensions*, Arrêt de la Cour (assemblée plénière) du 23 mars 2004 pour les affaires jointes C-22/08 et C-23/08, *Vatsouras et Koupatantze contre Arbeitsgemeinschaft (ARGE) Nürnberg 900*, Arrêt de la Cour (troisième chambre) du 4 juin 2009.
5. *Se reporter* notamment à l'affaire C-145/09, *Land Baden-Württemberg contre Panagiotis Tsakouridis*, Arrêt de la Cour (grande chambre) du 23 novembre 2010 et à l'affaire C-348/09, *P.I. contre Oberbürgermeisterin der Stadt Remscheid*, Arrêt de la Cour (grande chambre) du 6 mars 2012.

B. Questions 7 à 8 : La citoyenneté européenne *au-delà* des dispositions de la directive 2004/38/CE – Etudier l'application, au niveau national, du droit primaire européen

Nous rappelant tout particulièrement les décisions des affaires récentes comme *Rottmann* et *Ruiz Zambrano*,[6] il est clair que l'adoption de la directive 2004/38 n'a pas entièrement tronqué la compétence d'interprétation de la Cour de Justice relative aux droits de citoyenneté primaires conférés directement par les traités. Dans cette partie du questionnaire, nos questions sont formulées de manière à obtenir des informations permettant de déterminer à quel point les autorités nationales tiennent compte de cette jurisprudence et sont prêtes à aller au-delà des limites de la directive. Nous mettons l'accent sur deux domaines principaux : (1) les situations purement internes et la question de la discrimination à rebours, en particulier dans les affaires relatives aux droits des membres de la famille ; et (2) dans quelle mesure les règles nationales sur l'acquisition et la perte de la citoyenneté s'adaptent, ou bien quelles sont les conséquences spécifiques de ces règles sur l'acquisition et/ou la perte du statut de citoyen de l'Union.

7. En quelle mesure les cours et tribunaux nationaux tendent-ils à rejeter les arguments basés sur les droits de la citoyenneté européenne parce que le différend met en cause une 'situation purement interne' ? En quelle mesure la jurisprudence de la Cour de Justice fondée directement sur les dispositions relatives à la citoyenneté du TFUE (notamment *Chen*,[7] *Ruiz Zambrano* et les décisions ultérieures) a été réellement mise en œuvre et appliquée au niveau national ? La jurisprudence nationale fait-elle une claire distinction entre les droits acquis en vertu de la directive 2004/38 et ceux des articles 20 et/ou 21 du TFUE lorsque des citoyens européens demandent le regroupement familial dans leur Etat membre d'origine ?[8] Des changements législatifs ou administratifs particuliers ont-ils été mis

6. *Se reporter* à l'affaire C-135/08, *Janko Rottmann contre Freistaat Bayern*, Arrêt de la Cour (grande chambre) du 2 mars 2010 ; et l'affaire C-34/09, *Gerardo Ruiz Zambrano contre Office national de l'emploi (ONEm)*, Arrêt de la Cour (grande chambre) du 8 mars 2011.
7. L'affaire C-200/02, *Zhu et Chen contre Secretary of State for the Home Department*, Arrêt de la Cour (assemblée plénière) du 19 octobre 2004.
8. *Se reporter* à l'affaire C-434/09 *McCarthy contre Secretary of State for the Home Department*, Arrêt de la Cour (troisième chambre) du 5 mai 2011 ; et l'affaire C-256/11 *Dereci et autres contre Bundesministerium für Inneres*, Arrêt de la Cour (grande chambre) du 15 novembre 2011.

en place ? Comment ces questions sont-elles réglées par les cours et tribunaux nationaux ?

8. Dans le cadre de l'arrêt de *Rottmann*, en quelle mesure les règles d'acquisition et/ou de perte de la citoyenneté nationale tiennent-elles compte des implications liées aux exigences particulières de la citoyenneté européenne ? Veuillez prendre en considération les données de l'observatoire EUDO de la citoyenneté relatives à l'acquisition et à la perte de citoyenneté en répondant à cette question.

C. Questions 9 à 12 : Les droits politiques des citoyens européens

En dépit de l'accent mis, dans le traité de Lisbonne, sur le caractère participatif et représentatif de la démocratie dans l'ordre juridique de l'Union, les Etats membres continuent à accuser un certain retard face à la vision définie par les traités européens et par la législation européenne sur la mise en place de droits électoraux adéquats pour les citoyens de l'Union. Cette série de questions se penche sur : (1) La mise en œuvre de la directive 93/109/CE[9] sur les élections au Parlement européen ; (2) la mise en œuvre de la directive 94/80/CE[10] sur les élections locales ; (3) dans quelle mesure les citoyens européens qui résident dans le pays se voient accorder des droits électoraux pour les élections, notamment les élections régionales, dans le cadre du droit national, c'est-à-dire en sus des critères minimum fixés par les traités européens ; et (4) les restrictions nationales concernant l'accès aux droits électoraux qui s'appliquent aux citoyens de l'Union, notamment celles que les Etats membres imposent à leurs propres citoyens, qui peuvent être affectées par le droit communautaire.

9. Depuis quand la directive 93/109/CE sur les élections au Parlement européen est-elle entièrement mise en œuvre ? Y a-t-il eu des dérogations ? Existe-t-il des conditions supplémentaires imposées aux citoyens européens par rapport aux citoyens nationaux (procédure d'enregistrement spéciale ou exigences de résidence) ? Y a-t-il eu de la jurisprudence sur ce point dans les cours et tribunaux nationaux ? Quels changements sup-

9. Directive 93/109/CE, fixant les modalités de l'exercice du droit de vote et d'éligibilité aux élections au Parlement européen pour les citoyens de l'Union résidant dans un Etat membre dont ils ne sont pas ressortissants, [1993] JO L 329/34.
10. Directive 94/80/CE, fixant les modalités de l'exercice du droit de vote et d'éligibilité aux élections municipales pour les citoyens de l'Union résidant dans un Etat membre dont ils n'ont pas la nationalité, [1994] JO L 368/38.

plémentaires seront nécessaires suite aux modifications apportées par la directive 93/109/CE en décembre 2012.[11]

10. Depuis quand la directive 94/80/CE sur les élections locales est-elle entièrement mise en œuvre ? Y a-t-il eu des dérogations ? Existe-t-il des conditions supplémentaires imposées aux citoyens européens par rapport aux citoyens nationaux (procédure d'enregistrement spéciale ou exigences de résidence) ? Y a-t-il eu de la jurisprudence sur ce point dans les cours et tribunaux nationaux ?
11. Veuillez évoquer brièvement les élections, notamment les élections régionales, pour lesquelles les citoyens européens qui résident dans le pays se voient accorder des droits électoraux dans le cadre du droit national. Existe-t-il un droit de vote pour les citoyens européens qui va au-delà des droits électoraux aux élections locales et à celles du Parlement européen tels que prescrits dans le droit européen ? Pour quelles raisons ces droits ont-ils été étendus spécifiquement aux citoyens européens ?
12. Y a-t-il des domaines spécifiques dans lesquels il existe des tensions entre le droit européen et les dispositions nationales qui limitent l'étendue du droit de vote (notamment le droit de vote des personnes condamnées au pénal ou des personnes ayant un handicap mental) ? En répondant à cette question, les rapporteurs pourraient être intéressés de savoir qu'un nouveau courant jurisprudentiel est en train d'émerger au Royaume-Uni suite à l'application du droit européen, et plus particulièrement de l'article 39 de la Charte des droits fondamentaux, concernant des restrictions au droit de vote des prisonniers, qui sera soumis à la Cour suprême du Royaume-Uni en juin 2013.[12]

Veuillez prendre en considération les données de l'observatoire EUDO de la citoyenneté (FRACIT), notamment les rapports nationaux dans ce domaine, en répondant à ces questions.

---

11. Une directive modificatrice a été adoptée le 20 décembre 2012 par le Conseil des ministres, mais elle n'est pas encore publiée au JO (Document du Conseil 17198/12, 19 décembre 2012).
12. L'affaire écossaise de *McGeoch contre Lord President of the Council* [2011] CSIH 67 et l'affaire anglaise de *Chester contre Secretary of State for Justice* [2010] EWCA Civ 1439 ont été jointes et seront entendues devant la Cour suprême en juin 2013. Dans les deux affaires, les requérants invoquent qu'une suppression totale du droit de vote des prisonniers au Royaume-Uni pour les prochaines élections du Parlement européen en juin 2014 est disproportionnée.

D. Questions 13 à 15 : Culture(s) de la citoyenneté

Nous avons l'intention de définir l'émergence des *cultures* de la citoyenneté (européenne) dans trois domaines essentiels : (1) le statut de la citoyenneté de l'Union se construit autour du paradigme des *droits* individuels ; mais les lois sur l'immigration sont traditionnellement fondées sur le principe de *l'autorisation* – les acteurs nationaux (administratifs, législatifs et judiciaires) cherchent-ils à appliquer cette distinction *de manière appropriée* dans leur application et leur interprétation de la citoyenneté de l'Union ? (2) En quelle mesure la culture des droits a-t-elle été renforcée par le changement de statut juridique de la Charte des droits fondamentaux ? En d'autres termes, assiste-t-on à une intensification des arguments fondés sur la protection des droits individuels droit depuis l'entrée en vigueur du traité de Lisbonne en 2009 ? (3) Quel est le *ton* général du débat public, dans les médias et la société civile au sens large, sur le statut et les droits liés à la citoyenneté de l'Union ?

13. Sur la base des réponses aux questions ci-dessus, considérez-vous que la mise en œuvre des normes en matière de citoyenneté européenne dans votre Etat membre est comprise au niveau national comme faisant partie d'une culture européenne basée sur les droits de la « libre circulation » et des droits « constitutionnels », ou comme un ajout aux systèmes d'immigration national basé sur le principe de 'l'autorisation' aux non-résidents d'être présents sur le territoire national ?
14. L'effet contraignant de la Charte des droits fondamentaux de l'Union européenne, suite à l'entrée en vigueur du traité de Lisbonne en 2009, a-t-il joué un rôle dans la manière dont les droits des citoyens européens sont interprétés par les cours et/ou les tribunaux nationaux ?
15. Veuillez décrire dans quelle mesure les questions liées à la citoyenneté européenne se sont imposées dans les médias nationaux, et la manière dont ces questions ont été reprises dans les médias nationaux. Certains thèmes ont-ils dominé dans les informations données par les médias (notamment l'expulsion, l'obtention de prestations sociales, les droits dérivés pour les résidents de pays tiers) ? Quelle est *l'exactitude* de l'information rapportée au niveau national sur les questions relatives à la citoyenneté européenne ? Pouvez-vous percevoir l'influence des médias dans le discours public au niveau national ?

FIDE 2014

Fragebogen, Generalthema 2

Unionsbürgerschaft: Entwicklung, Auswirkungen und Herausforderungen

Niamh Nic Shuibhne und Jo Shaw [1]

Einführung

Die Unionsbürgerschaft befindet sich an der Grenzfläche von Integration und Konstitutionalismus und ist somit ein Barometer für wichtige Trends und Einflüsse an den Schnittpunkten von Mitgliedstaaten und der Europäischen Union. Mit diesem Fragebogen soll die Ausarbeitung nationaler Berichte angeregt werden, die uns in erster Linie dabei helfen werden, ein besseres Verständnis für die Entwicklung der mit der Unionsbürgerschaft verknüpften Rechte und deren Anwendung in den Rechtsordnungen der Mitgliedstaaten zu entwickeln. Um dieses Ziel zu erreichen, sind wir zunächst an Beispielen dafür interessiert, wie nationale Legislativen, Exekutiven und Judikativen die Aspekte der Unionsbürgerschaft auslegen und anwenden, die eine Umsetzung auf nationaler Ebene verlangen. Wir möchten aber auch Hinweise darauf zusammentragen, wie diese Akteure auf die Rechtsprechung des Europäischen Gerichtshofs zu Bürgerrechten reagieren, die außerhalb der Parameter einer direkten nationalen Umsetzung liegen.

Eine Analyse dieser vielfältigen empirischen Daten ermöglicht auch die Darstellung der mit einer Unionsbürgerschaft verbundenen Rechte in einer vergleichenden Perspektive. Die Anwendung von EU-Recht erfolgt in den meisten Fällen auf nationaler Ebene, erreicht also nicht die EU-Institutionen selbst. Das EUDO Citizenship Observatory und dessen Datensätze über den Erwerb und Verlust von Staatsbürgerschaft und, jüngeren Datums, über das

1. Universität Edinburgh. Alle drei Fragebögen wurden ursprünglich auf English ausgearbeitet und anschließend ins Französische und Deutsche übersetzt. Sollte es Abweichungen geben, sind es die englischen Versionen, die am besten das Denken der Berichterstatter repräsentieren.

Wahlrecht,[2] beginnen, eine entscheidende Informationslücke in diesem Zusammenhang zu schließen. Mit der Kreuztabellierung dieser Daten und den für den FIDE Kongress vorbereiteten nationalen Berichten wird das verfügbare Material weiter deutlich verbessert und damit auch unser Verständnis für die *Realität* der Unionsbürgerschaft vertieft.

Wir möchten aber auch, als zweites Ziel, ein besseres Verständnis dafür entwickeln, wie sich die Unionsbürgerschaft im Rahmen der *Kultur* nationaler Staatsbürgerschaften entwickelt bzw. sich auf diese auswirkt. Wie werden beispielsweise die mit der Unionsbürgerschaft verknüpften Rechte in nationalen Medien und im öffentlichen oder zivilgesellschaftlichen Diskurs dargestellt? Medienakteure können aufgrund ihrer Position den Ton der nationalen Debatte besonders leicht prägen. Haben die Medien, was die Unionsbürgerschaft betrifft, Verantwortungsbewusstsein gezeigt, beispielsweise durch die Weitergabe korrekter Informationen über geltende Rechte? Und wie hat der zivilgesellschaftliche Diskurs, z. B. über Blogs und Websites, auf diese Lenkung reagiert? Allgemeiner gefragt, wie ist das Verhältnis des EU-Rechts der Freizügigkeit und der damit verbundenen Bürgerrechte zu nationalem *Einwanderungsrecht*? Außerdem können im Überschneidungsgebiet von nationaler Staatsbürgerschaft und Unionsbürgerschaft Fragen über die existierenden und nicht existierenden Rechte von *nicht von ihrem Recht auf Freizügigkeit Gebrauch machenden* Unionsbürgern auftreten und wie diese die Wahrnehmung der Unionsbürgerschaft und von Personen, die die Rechte *mobiler* Bürger in Anspruch nehmen, beeinflussen.

Die Fragen zur Unionsbürgerschaft und der damit verbundenen Rechte decken ein potenziell riesiges Gebiet ab. Wir haben uns deswegen entschlossen, den Schwerpunkt in diesem Fragebogen auf vier vorrangige *bürgerspezifische* Themenbereiche zu legen. Dabei versuchen wir zu verstehen, wie nationale Akteure die einen *Mehrwert* bietenden Rechte der Unionsbürgerschaft auslegen und anwenden, d. h. solche Rechte, die über die Rechte hinausgehen, die an bekanntere Kategorien der Freizügigkeit geknüpft sind, wie z. B. bei Arbeitnehmern. Unsere vier Schwerpunktthemen sind:

A. Unionsbürgerschaft im Rahmen der Richtlinie 2004/38/EG[3]
B. Unionsbürgerschaft außerhalb der Richtlinie 2004/38/EG
C. Politische Rechte von Unionsbürgern

2. *Siehe* http://eudo-citizenship.eu/databases.
3. Richtlinie 2004/38/EG über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, ABl. L158/77 2004.

D. Neu entstehende Kultur(en) der Staatsbürgerschaft

Mit diesen unterschiedlichen, allerdings zusammenhängenden Elementen der Entwicklung und Auswirkungen einer Unionsbürgerschaft präsentieren wir in unserem gemeinsamen Bericht einen Querschnitt an Erkenntnissen darüber, wie die Unionsbürgerschaft in die nationalen konstitutionellen, rechtlichen und politischen Kulturen eingebettet ist (oder auch nicht). Außerdem ist es unser Ziel, wichtige Herausforderungen aufzuzeigen, die die Umsetzung der Unionsbürgerschaft in den Mitgliedstaaten beeinflussen.

Leitlinien zur Beantwortung der Fragen

Bitte beachten Sie bei der Beantwortung der Fragen Folgendes:

- Informationen sollten so dargestellt werden, dass sie Zuhörern aus den verschiedensten Ländern zugänglich sind, d. h., nationale Fragen sollen in einem verständlichen Zusammenhang erklärt werden und über alle Mitgliedstaaten hinweg vergleichbar sein.
- Antworten sind evidenzbasiert und objektiv darzulegen: Wir sind mehr an Beispielen interessiert als an einem vollständigen Bericht zu nationalen Rechtsproblemen (was die Möglichkeiten des Berichts eines Einzelnen überschreitet). Objektiv dargelegte Beispiele bieten deutlich bessere Vergleichsdaten als die Ansichten eines bestimmten Berichterstatters. Nichtsdestotrotz sollte die Beurteilung, ob EU-Recht wirksam auf nationaler Ebene umgesetzt ist, falls erforderlich, aufgenommen werden.

Berichterstatter werden außerdem gebeten, soweit angemessen, Angaben über die Stellungnahmen der folgenden Institutionen/Körperschaften zu einschlägigen Rechtsfragen in ihren Bericht aufzunehmen:

- Rechtsprechung von Gerichten und Rechtsinstanzen im jeweiligen Zuständigkeitsbereich
- Exekutive und Legislative in den beschriebenen Mitgliedstaaten
- Akademische Artikel und Fachartikel aus dem jeweiligen Mitgliedstaat
- Medien aus dem jeweiligen Mitgliedstaat

Themen und Fragen

A. 1.-6. Frage: Unionsbürgerschaft *im Rahmen* der Richtlinie 2004/38/EG – Beständigkeit des Aufenthalts von Unionsbürgern und ihren Familienangehörigen

Die Annahme der Richtlinie 2004/38/EG war ein wichtiger Meilenstein für die Regelung der Unionsbürgerschaft. Insbesondere ging man davon aus, dass die Anwendung der mit der Unionsbürgerschaft verknüpften Rechte durch nationale Exekutiven, Legislativen und Judikativen aufgrund der Existenz dieses ausführlichen Rahmentextes deutlich verbessert würde. Aber ist dem tatsächlich so? Die für diesen Abschnitt des Fragebogens ausgearbeiteten Fragen beschäftigen sich mit für die Unionsbürgerschaft spezifischen Elementen der Richtlinie vor dem Hintergrund einer thematischen Fragestellung zur *Beständigkeit* des Aufenthalts von Unionsbürgern und ihren Familienangehörigen. Angesprochen wird Folgendes: (1) die sich herausbildende Definition von Familienangehörigen und Abhängigkeitsverhältnissen; (2) die potenziellen Probleme der Aufenthaltsbeständigkeit aufgrund der Forderung der Richtlinie nach finanzieller Unabhängigkeit; (3) die wegweisende Schaffung von *direkten* EU-Rechten für Familienangehörige von Unionsbürgern, einschließlich Angehöriger, die nicht die Staatsangehörigkeit eines Mitgliedstaats besitzen; (4) das ähnlich revolutionäre Konzept und der Status eines »Daueraufenthalts«; (5) die ausdrückliche zeitliche Begrenzung des Anspruchs auf bestimmte Sozialhilfeleistungen; und (6) die rechtlichen Unterschiede zwischen verschiedenen Gruppen von Unionsbürgern in Verbindung mit der Ausweisung, insbesondere vor dem Hintergrund der überraschend moderaten jüngsten Urteile des Europäischen Gerichtshofs und in Anbetracht des Ausmaßes, in dem Behörden der Mitgliedstaaten die »Aufweichungskriterien« bei Entscheidungen über die Ausweisung von Unionsbürgern und ihren Familienangehörigen in Erwägung ziehen und anwenden.

1. Wie wurden Artikel 2, 3 und 5 der Richtlinie in Bezug auf Familienangehörige von Unionsbürgern in nationales Recht umgesetzt? Wie gehen nationale Gerichte und Rechtsinstanzen mit den verschiedenen in Artikel 2 und 3 genannten Verwandtschaftsgraden um? Bieten die Verfahrensvorschriften in Artikel 5 einen *wirksamen* Schutz?
2. Gibt es Beweise für die Ausweisung von Unionsbürgern (und/oder ihren Familienangehörigen) aus rein finanziellen Gründen (d. h. Nichterfüllung

der Auflagen in Artikel 7 der Richtlinie), beispielsweise in Urteilen nationaler Gerichte und Rechtsinstanzen?

3. Wie wurden Artikel 12 bis 15 der Richtlinie in nationales Recht umgesetzt? Wurden Streitigkeiten in Bezug auf die Auslegung oder Anwendung dieser Rechtsvorschriften vor ein nationales Gericht oder eine nationale Rechtsinstanz gebracht?
4. Wie wurden Artikel 16 bis 21 der Richtlinie in nationales Recht umgesetzt? Wurden in Ihrem Mitgliedstaat Daten über die bisherige Anzahl Anträge für den Status Daueraufenthalt veröffentlicht? Wurden Streitigkeiten in Bezug auf die Auslegung oder Anwendung dieser Rechtsvorschriften vor ein nationales Gericht oder eine nationale Rechtsinstanz gebracht?
5. Wie wurde Artikel 24 Absatz 2 der Richtlinie in nationales Recht umgesetzt? Unterscheidet nationales Recht ebenfalls zwischen den in Artikel 24 Absatz 2 genannten Kategorien und Arbeitssuchenden, was Anspruch auf Sozialhilfe betrifft? Hat Artikel 24 Absatz 2 die Rechtsprechung zur »tatsächlichen Verbindung« des Europäischen Gerichtshofs an nationalen Gerichten oder Rechtsinstanzen ersetzt?[4]
6. Bitte beschreiben Sie, wie nationale Gerichte und Rechtsinstanzen die Konzepte »öffentliche Ordnung, Sicherheit oder Gesundheit« (Artikel 27), »schwerwiegende Gründe der öffentlichen Ordnung oder Sicherheit« und »zwingende Gründe der öffentlichen Sicherheit« verstehen, anwenden und unterscheiden.[5] Wie wird der Grundsatz der Verhältnismäßigkeit in diesem Zusammenhang verstanden und angewendet? Wie wurden von nationalen Gerichten und Rechtsinstanzen Gründe wie die Dauer des Aufenthalts des Betroffenen im Hoheitsgebiet, sein Alter, sein Gesundheitszu-

---

4. *Vergleiche* z. B. den Ansatz der »tatsächlichen Verbindung« in der Rechtssache C-209/03, *The Queen, auf Antrag von Dany Bidar gegen London Borough of Ealing und Secretary of State for Education and Skills*, Urteil des Gerichtshofes (Große Kammer) vom 15. März 2005, und das anschließende Urteil in der Rechtssache C-158/07, *Jacqueline Förster gegen Hoofddirectie van de Informatie Beheer Groep*, Urteil des Gerichtshofes (Große Kammer) vom 18. November 2008; und in Verbindung mit Arbeitssuchenden die Rechtssache C-138/02, *Brian Francis Collins gegen Secretary of State for Work and Pensions*, Urteil des Gerichtshofes (Plenum) vom 23. März 2004 in Verbindung mit den Rechtssachen C-22/08 und C-23/08, *Athanasios Vatsouras und Josif Koupatantze gegen Arbeitsgemeinschaft (ARGE) Nürnberg 900*, Urteil des Gerichtshofes (Dritte Kammer) vom 4. Juni 2009.
5. *Siehe* z. B. Rechtssache C-145/09, *Land Baden-Württemberg gegen Panagiotis Tsakouridis*, Urteil des Gerichtshofes (Große Kammer) vom 23. November 2010, und Rechtssache C-348/09, *P.I. gegen Oberbürgermeisterin der Stadt Remscheid*, Urteil des Gerichtshofes (Große Kammer) vom 22. Mai 2012.

stand, seine familiäre und wirtschaftliche Lage, seine soziale und kulturelle Integration im Aufnahmemitgliedstaat und das Ausmaß seiner Bindungen zum Herkunftsstaat berücksichtigt?

B. 7. -8. Frage: Unionsbürgerschaft *außerhalb* der Richtlinie 2004/38/EG – Untersuchung der nationalen Anwendung von primärem EU-Recht

Angesichts insbesondere der jüngsten Urteile wie in den Fällen *Rottmann* und *Ruiz Zambrano*[6] steht fest, dass die Annahme der Richtlinie 2004/38/EG die Auslegungsbefugnis des Europäischen Gerichtshofs in Bezug auf die direkt über Verträge verliehenen primären Bürgerrechte nicht vollständig eingeschränkt hat. Die für diesen Abschnitt des Fragebogens ausgearbeiteten Fragen sollen Informationen über das Ausmaß bereitstellen, in dem nationale Behörden auf diese Rechtsprechung reagieren und bereit sind, die durch die Richtlinie gegebenen Grenzen zu überschreiten. In diesem Zusammenhang konzentrieren wir uns auf zwei Hauptbereiche: (1) »rein interne Situationen« und die Frage einer umgekehrten Diskriminierung, insbesondere in Fällen, bei denen es um die Rechte von Familienangehörigen geht; und (2) das Ausmaß, in dem nationale Vorschriften über den Erwerb und den Verlust der Staatsbürgerschaft die spezifischen Auswirkungen der Vorschriften für den Erwerb und/oder den Verlust des Status der Unionsbürgerschaft berücksichtigen oder nicht.

7. In welchem Ausmaß neigen nationale Gerichte und Rechtsinstanzen dazu, Argumente auf der Grundlage von mit der Unionsbürgerschaft verknüpften Rechten mit der Begründung zurückzuweisen, dass die Streitigkeit eine rein interne Situation darstellt? In welchem Ausmaß wurde die Rechtsprechung des Europäischen Gerichtshofs, die direkt auf den Vorschriften des AEUV über die Unionsbürgerschaft beruht (z. B. *Chen*,[7] *Ruiz Zambrano* und Folgeurteile), wirksam auf nationaler Ebene umgesetzt und angewendet? Unterscheidet die nationale Rechtsprechung eindeutig zwischen Rechten gemäß der Richtlinie 2004/38/EG und denen gemäß Arti-

6. *Siehe* Rechtssache C-135/08, *Janko Rottmann gegen Freistaat Bayern*, Urteil des Gerichtshofes (Große Kammer) vom 2. März 2010; und Rechtssache C-34/09, *Gerardo Ruiz Zambrano gegen Office national de l'emploi (ONEm)*, Urteil des Gerichtshofes (Große Kammer) vom 8. März 2011.
7. Rechtssache C-200/02, *Kunqian Catherine Zhu und Man Lavette Chen gegen Secretary of State for the Home Department*, Urteil des Gerichtshofes (Plenum) vom 19. Oktober 2004.

kel 20 und/oder 21 AEUV, wenn Unionsbürger ihr Recht auf Familienzusammenführung aus ihren Herkunftsmitgliedstaaten geltend machen?[8] Wurden rechtliche oder spezifische verwaltungsrechtliche Veränderungen eingeführt? Wie gehen nationale Gerichte mit diesen Fragen um?

8. In welchem Ausmaß reflektieren die Vorschriften über den Erwerb und/oder den Verlust einer nationalen Staatsbürgerschaft angesichts des Urteils in der Rechtssache *Rottmann* die Auswirkungen der fraglichen Anforderungen für die Unionsbürgerschaft? Bei der Beantwortung dieser Frage sollten die Daten über Erwerb und Verlust der Staatsbürgerschaft des EUDO Citizenship Observatory berücksichtigt werden.

C. 9.-12. Frage: Politische Rechte von Unionsbürgern

Ungeachtet der Bedeutung der partizipatorischen und repräsentativen Ausübung von Demokratie in der EU-Rechtsordnung, wie dies im Vertrag von Lissabon eindeutig festgelegt ist, ist es den Mitgliedstaaten immer noch nicht gelungen, die in den EU-Verträgen und durch die EU-Rechtsprechung geschaffene Vorstellung eines angemessenen Wahlrechts für Unionsbürger umzusetzen. In diesen Fragenblock untersuchen wir: (1) die Umsetzung der Richtlinie 93/109/EG[9] über Wahlen zum Europäischen Parlament; (2) die Umsetzung der Richtlinie 94/80/EG[10] über Kommunalwahlen; (3) das Ausmaß, in dem Unionsbürger mit Wohnsitz in einem anderen Mitgliedstaat nach nationalem Recht, d. h. über die durch die EU-Verträge gesetzten Grenzen hinaus, Anspruch auf Ausübung des Wahlrechts bei regionalen und anderen Wahlen haben; und (4) nationale Beschränkungen der Ausübung des Wahlrechts von Unionsbürgern, einschließlich solcher, die auch für die eigenen Bürger gelten, wodurch EU-Recht betroffen sein kann.

---

8. *Siehe* Rechtssache C-434/09 *Shirley McCarthy gegen Secretary of State for the Home Department*, Urteil des Gerichtshofes (Dritte Kammer) vom 5. Mai 2011; Case C-256/11 *Murat Dereci und andere gegen Bundesministerium für Inneres*, Urteil des Gerichtshofes (Große Kammer) vom 15. November 2011.
9. Richtlinie 93/109/EG über die Einzelheiten der Ausübung des aktiven und passiven Wahlrechts bei den Wahlen zum Europäischen Parlament für Unionsbürger mit Wohnsitz in einem Mitgliedstaat, dessen Staatsangehörigkeit sie nicht besitzen, ABl. L 329/34 1993.
10. Richtlinie 94/80/EG über die Einzelheiten der Ausübung des aktiven und passiven Wahlrechts bei den Kommunalwahlen für Unionsbürger mit Wohnsitz in einem Mitgliedstaat, dessen Staatsangehörigkeit sie nicht besitzen, ABl. L 368/38 1994.

9. Seit wann ist die Richtlinie 93/109/EG über Wahlen zum Europäischen Parlament vollständig umgesetzt? Gibt es Ausnahmeregelungen? Gibt es zusätzliche Auflagen für Unionsbürger im Vergleich zu den Bürgern des fraglichen Landes (besondere Registrierung oder Wohnsitzvorschriften)? Liegen einschlägige Urteile der nationalen Gerichte vor? Welche zusätzlichen Änderungen ergeben sich aus den Änderungen zur Richtlinie 93/109/EWG vom Dezember 2012?[11]
10. Seit wann ist die Richtlinie 94/80/EG über Kommunalwahlen vollständig umgesetzt? Gibt es Ausnahmeregelungen? Gibt es zusätzliche Auflagen für Unionsbürger im Vergleich zu den Bürgern des fraglichen Landes (besondere Registrierung oder Wohnsitzvorschriften)? Liegen einschlägige Urteile der nationalen Gerichte vor?
11. Nennen Sie kurz regionale und andere Wahlen, bei denen Unionsbürger mit Wohnsitz in Ihrem Land nach nationalem Recht das Wahlrecht ausüben können. Haben Unionsbürger Rechte, die über das ihnen nach EU-Recht zustehende Recht zur Teilnahme an Kommunalwahlen und Wahlen zum Europäischen Parlament hinausgehen? Wie wurde die Ausweitung derartiger Rechte auf gerade Unionsbürger begründet?
12. Gibt es in bestimmten Bereichen Konflikten zwischen EU-Recht und nationalen Vorschriften, wodurch der Anwendungsbereich des Rechts begrenzt wird (z. B. in Bezug auf das Wahlrecht von verurteilten Straftätern oder Personen mit geistigen Behinderungen)? Bei der Beantwortung dieser Frage ist es für Berichterstatter vielleicht von Interesse, dass sich in dem Vereinigten Königreich eine Rechtsprechung in Bezug auf die Anwendung von EU-Recht, insbesondere Artikel 39 der EU-Charta der Grundrechte, herausbildet, mit der das Wahlrecht von Häftlingen eingeschränkt wird. Eine Entscheidung des Obersten Gerichtshofs des Vereinigten Königreichs wird für Juni 2013 erwartet.[12]

---

11. Eine geänderte Richtlinie wurde am 20. Dezember 2012 vom Ministerrat verabschiedet, ist jedoch noch nicht im Amtsblatt veröffentlicht (Ratsdokument 17198/12, 19. Dezember 2012).
12. Die schottische Rechtssache *McGeoch gegen Lord President of the Council*, [2011] CSIH 67, und die englische Rechtssache *Chester gegen Secretary of State for Justice*, [2010] EWCA Civ 1439, werden gemeinsam im Juni 2013 vor dem Obersten Gerichtshof verhandelt. In beiden Fällen werden die Kläger vorbringen, dass die totale Verweigerung des Wahlrechts für Häftlinge im Vereinigten Königreich in Bezug auf die kommende Wahl zum Europäischen Parlament im Juni 2014 unverhältnismäßig ist.

Bei der Beantwortung der Fragen sollten auch die Daten des EUDO Citizenship Observatory (FRACIT) berücksichtigt werden, insbesondere der einschlägigen nationalen Berichte.

D. 13.-15. Frage: Kultur(en) der Staatsbürgerschaft

Die neu entstehenden *Kulturen* der Unionsbürgerschaft sollen in drei wesentlichen Bereichen beleuchtet werden: (1) Der Status der Unionsbürgerschaft beruht auf dem Paradigma individueller *Rechte*; die Grundlage des Einwanderungsrechts ist traditionell mehr in einer Grundhaltung der *Erlaubnis* zu suchen. Wird diese Unterscheidung von nationalen Akteuren (Exekutive, Legislative und Judikative) bei der Anwendung und Auslegung der Unionsbürgerschaft *angemessen* beachtet? (2) In welchem Ausmaß wurde die Kultur der Rechte durch den geänderten Rechtsstatus der EU-Charta für Grundrechte gestärkt? Anders ausgedrückt: Nehmen die auf Rechten basierenden Argumente seit des Inkrafttretens des Vertrags von Lissabon im Jahr 2009 zu? (3) Wie ist der allgemeine *Ton* der nationalen Debatte in den Medien und allgemeiner in der Zivilgesellschaft über den Status der Unionsbürgerschaft und der damit verbundenen Rechte?

13. Sind Sie angesichts der Antworten auf die vorigen Fragen der Auffassung, dass die Umsetzung der Unionsbürgerschaft in Ihrem Mitgliedstaat auf nationaler Ebene als Teil der auf Rechten basierenden Freizügigkeit und konstitutionellen Kultur innerhalb der EU verstanden wird oder als ein Zusatz für das nationale Einwanderungssystem, das Menschen aus anderen Staaten die Erlaubnis für den Aufenthalt im Hoheitsgebiet erteilt?
14. Hat die bindende Wirkung der EU-Charta der Grundrechte nach dem Inkrafttreten des Vertrags von Lissabon im Jahr 2009 eine Rolle dabei gespielt, wie die Rechte von Unionsbürgern von nationalen Gerichten und Rechtsinstanzen ausgelegt werden?
15. Beschreiben Sie das Ausmaß, in dem Fragen zur Unionsbürgerschaft zu wichtigen Fragen in nationalen Medien wurden und wie nationale Medien mit diesen Fragen umgegangen sind. Wird die Berichterstattung der Medien von speziellen Themen beherrscht (z. B. Ausweisung, Sozialhilfeleistungen; abgeleitete Rechte von Bürgern aus Drittländern)? Wie *korrekt* ist die nationale Berichterstattung über Fragen zur Unionsbürgerschaft? Können Sie Hinweise auf den Einfluss der Medien auf die nationale öffentliche Debatte entdecken?

General report

Niamh Nic Shuibhne and Jo Shaw[1]

Introduction

Let us pause for a moment to consider the scale of the issue. In 2013, the population of the European Union stood at an estimated 507m person,[2] of whom around 20m are not citizens of an EU Member State. That leaves nearly 490m EU citizens resident within the EU and doubtless quite a number who are resident in third countries. Some 13m persons are resident in a Member State other than the State(s) of which they have citizenship, or, if they have the citizenship of the host State, are resident as migrant EU citizens.[3] This is the primary group of persons benefitting from the free movement rights associated with Union citizenship on a longer term basis, although there are, of course, many millions more who exercise these freedoms and rely upon their equal treatment rights on a daily or almost daily basis – as tourists and travellers, as frontier workers, as persons providing or receiving services on a cross-border basis, as consumers of products originating in another Member State. Union citizens who reside in another Member State still remain a small proportion of EU citizens overall, but they now constitute a sizeable group – equivalent to the population of a smallish Member State.

Union citizenship is a legal status established by the EU Treaties, which is additional to national citizenship (and dependent upon it). According to the Court of Justice, it is a status that is 'destined to be the fundamental status of nationals of the Member States'.[4] In this Report, by reference to data generated by national reports and supported by the insights of the Institutional Report, we attempt to uncover a little more about what it actually means, and

1. Niamh Nic Shuibhne, Professor of European Union Law, University of Edinburgh; Jo Shaw, Salvesen Chair of European Institutions and Director of the Institute for Advanced Studies in the Humanities, University of Edinburgh. The report was finalised on the 12th of March 2014.
2. See the data at http://europa.eu/about-eu/facts-figures/living/index_en.htm.
3. See the data at http://epp.eurostat.ec.europa.eu/statisticsexplained/ index.php/Migration_and_migrant_population_statistics.
4. Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31.

how it is experienced as a legal status by those who rely upon the rights associated with it.

Moreover, as both a status and an ideal, Union citizenship stands at the interface of integration and constitutionalism, and is a barometer for key trends and influences at the current crossroads between the Member States and the European Union. It is also a status that is shared between and shaped by both levels of governance. What are the consequences and implications of that dynamic in reality?

The primary purpose of the questionnaire developed for this topic was to stimulate national reports that enable us to understand better how the rights attached to Union citizenship are developing and being applied within the legal orders of the Member States. To achieve that objective, we were interested, in the first instance, in examples that demonstrate how legislatures, administrations, and judiciaries are interpreting and applying the elements of EU citizenship that require implementation at national level. Fundamentally, are EU citizenship claims treated *differently from* or as a subsumed *part of* national immigration law?

We were also keen to gather evidence on how national actors are responding to case law of the Court of Justice relating to citizenship rights that sit outside the parameters of direct national implementation. For example, thinking about the boundary between national citizenship and EU citizenship, questions were asked about the rights that *static* EU citizens have, or do not have, and about how recent developments in this area have affected perceptions of EU citizenship within the Member States.

Analysis of this rich empirical data has enabled us to present a comparative perspective on the development of EU citizenship rights. Most situations involving the application of EU legal rights happen at national level, and never reach the EU institutions at all. The EUDO Citizenship Observatory and its existing datasets on the acquisition and loss of citizenship, and more recently on electoral rights, have started to fill a crucial information gap in this context (http://eudo-citizenship.eu/databases); but cross-tabulation of that data with the national reports prepared for the FIDE Congress enhances the available material on these questions, extends the dataset into several other dimensions of Union citizenship, and thus informs and deepens our understanding of the *reality* of Union citizenship very significantly.

As a secondary objective, we were also keen to get a greater sense of how Union citizenship is developing within and/or impacting upon *culture(s)* of citizenship. For example, how are EU citizenship rights being portrayed by the national media and in popular or civil society discourse? Media actors have an extraordinary platform from which to shape the tone of national de-

bate; have they acted responsibly (e.g. by providing accurate information on the applicable rights) in the specific context of Union citizenship? How is civil society discourse (e.g. as emerging through blogs and websites) responding to that steer?

Turning to questions of methodology, the span of Union citizenship and associated rights covers a potentially enormous field[5] and we decided, therefore, to focus on four key *citizen-specific* themes in the questionnaire. What we were seeking to understand is how national actors are interpreting and applying the *added-value* rights of Union citizenship i.e. rights beyond those attached to more established free movement categories, such as workers. Our four selected themes are:

A. Citizenship within Directive 2004/38;
B. Citizenship beyond Directive 2004/38;
C. The political rights of EU citizens;
D. The emerging culture(s) of citizenship.

By focusing on these distinct yet interrelated elements of the development and impact of Union citizenship, we seek to offer in our General Report a cross section of insights into how EU citizenship has (or has not) become embedded into national constitutional, legal, and political cultures. We also present reflections on the extent to which national law and practices influence EU law and practices, and vice versa. Finally, we try to identify key challenges affecting the realisation and enforcement of Union citizenship within the Member States, and to anticipate some emerging frontiers of citizenship's continuing evolution.

Two final points should be noted with respect to our general approach. First, noting that the context of and history behind the development of current EU law is presented so comprehensively in the Institutional Report, we have not tried to replicate that dimension of the story of citizenship rights here. Rather, the two Reports can be taken as complementary from that perspective. Second, noting the different versions (and thus pagination) of national reports that we have worked with over the duration of preparing this Report, we do not use specific page references when national reports are cited or short quotations are included in this Report. All references to national reports that fol-

5. This is one reason among several why we were grateful to the FIDE 2014 organising committee for giving us the opportunity to work as co-Rapporteurs on this topic, thus bringing to the table our complementary areas of expertise in this vast field.

low can therefore be taken to relate to the specific question being discussed unless otherwise specified.

Finally, we wish to thank Katarína Macdonald Tömölová for her invaluable research assistance on this project, supported by the School of Law at the University of Edinburgh; Kat led on the drafting for Question 15.

Citizenship *within* Directive 2004/38 – Stability of residence for Union citizens and their family members

The adoption of Directive 2004/38/EC[6] was a significant milestone in the regulation of Union citizenship. Its preamble articulates a dual ambition: to *simplify* and *strengthen* the right of free movement and residence of all Union citizens. In particular, it was anticipated that the application of EU rights by national legislatures, administrations, and judiciaries would be considerably improved by the existence of this detailed framework text. To explore the extent to which this has materialised in reality – and, in particular, to build on the Commission's disquieting 2008 report on the application of the Directive[7] – the questions discussed in this part of the Report engage with citizenship-specific elements of the Directive against a thematic concern about *stability* of residence for EU citizens and their family members when they move to and reside in host Member States. The questions address:

(1) Evolving definitions of **family members** and **relationships of dependency**;
(2) Potential challenges to residence stability generated by the Directive's **self-sufficiency** conditions;
(3) Ground-breaking *direct* **EU rights for family members** of Union citizens, including third country national family members;
(4) The revolutionary concept and rights of **permanent residence**;
(5) Express temporal limitations placed on **access to certain social security benefits**; and
(6) Intended distinctions between different groups of Union citizens in the context of **expulsion**.

6. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77.
7. COM(2008) 840 final.

Question 1

With respect to a Union citizen's family members, how have Articles 2, 3 and 5 of the Directive been transposed into national law? How have national courts dealt with the different types of family relationships outlined in Articles 2 and 3? Are the procedural safeguards contained in Article 5 providing *effective* protection?

Article 2: Definitions

For the purposes of this Directive:
1) 'Union citizen' means any person having the nationality of a Member State;
2) 'Family member' means:
   (a) the spouse;
   (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
   (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
   (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
3) 'Host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

1.1. Article 2: Introduction

Article 2(1) confirms the basic gateway condition to Union citizenship that is laid down in Article 20 TFEU: the holding of Member State nationality. Article 2(2) then provides a definition of 'family members' of Union citizens – a definition that goes beyond previous legislation in certain respects. Building on the logic of the decision in *Reed*,[8] for example, Article 2(2)(b) includes the registered partner of a Union citizen – but only if such partnerships have been, first, contracted 'on the basis of the legislation of a Member State' and, second, are treated as equivalent to marriage in the legislation of the host State (and in accordance with any conditions also laid down in that legislation). For direct descendants of Union citizens (or of their spouses or registered partners) who are over 21 – and also for direct relatives in the ascending

8. Case 59/85 *Reed* [1986] ECR 1283.

line of the citizen (or of his or her spouse, or his or her registered partner) – the criterion of 'dependency' must be met.

Article 2(3) reflects a critical point about the scope of Directive 2004/38 generally: it applies only when a Union citizen has moved to another State. Conversely, the Directive was not intended to address situations that are purely internal to a Member State[9] and it does not address – directly at least – situations in which a Union citizen returns to his or her home State after a period of residence in another Member State. Whether or not the conditions and limitations contained in the Directive apply *indirectly* in such situations is one of the issues addressed very recently by the Court of Justice.[10] Interestingly, some States had already addressed the question. For example, the report for Finland mentions that the national rules implementing Directive 2004/38 apply to the family members of Finnish citizens 'if the Finnish citizen has exercised his or her right of free movement under the Directive by settling in another Member State, and the family member accompanies him or her to Finland or joins him or her later'. Questions about differential treatment of home State nationals in a 'returning' situation are also raised in the reports for Estonia and Ireland.

Three general points on the scope of Article 2 can be noted here. First, the significance of qualifying as an Article 2(2) family member who accompanies or joins a migrant Union citizen is seen in Article 3(1): simply put, the substantive provisions of the Directive – including the right to work in the host State – will apply.

Second, while the situation of registered partners is rendered host State conditional in Article 2(2)(b), the legal position of same sex *spouses* is not clear: do *all* spouses fall within Article 2(2)(a)? Such an interpretation could

9. Confirmed in e.g. Case C-434/09 *McCarthy* [2011] ECR I-3375, paras 39-41.
10. Case C-456/12 *O* and Case C-457/12 *S*; both judgments were delivered on 12 March 2014. On this point, the Court ruled: '[s]o far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in a host Member State, those conditions should not, in principle, be more strict than those provided for by Directive 20004/38 for the grant of such a right of residence ... in a case where that citizen has exercised his right of freedom of movement ... Even though Directive 2004/38 does not cover such a return, *it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national*, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third−country national who is a member of his family' (*O*, para. 50; emphasis added).

be supported by recital 31 of the preamble, which confirms that the Directive 'respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as ... sexual orientation'.

Third, the criterion of dependency is not (in contrast to Article 3(2), discussed in Section 1.3 below) elaborated, suggesting that it should be defined in accordance with EU rather than national law. In *Iida*, the Court stated that a status of dependency 'is the result of a factual situation characterised by the fact that *material support* for the family member is provided by the holder of the right of residence'.[11] In *Reyes*, it added that a descendant over 21 does not need 'to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself' and, moreover, 'the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant'.'[12]

Importantly, however, the Court also confirmed in *Reyes* that a dependent family member who does subsequently engage in economic activity in the host State does not lose his or her right of residence there, since to conclude otherwise would 'infringe Article 23 of [the Directive], which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment'.[13]

1.2. Transposition, application, and interpretation of Article 2

No widespread problems with the transposition of Article 2 into national law were raised in the national reports, with most noting that the provision has

11. Case C-40/11 *Iida*, judgment of 8 November 2012, para. 55 (emphasis added), affirming the pre-Directive position established in e.g. Case C-1/05 *Jia* [2007] ECR I-1, para. 35. For national case law examining the extent of material dependency in the context of Article 2(2), see the reports for Slovenia, and Spain (which also addresses dependency beyond *economic* need, on the premise of respect for family life).
12. Case C-423/12 *Reyes*, judgment of 16 January 2014, paras 25 and 33.
13. *Reyes*, paras 31-32.

been translated very directly or literally in the relevant national measures.[14] In fact, it is clear that several States have chosen to provide for more extensive protection of family members than Directive 2004/38 actually requires. Nevertheless, the definitions codified in the Directive raise critical questions about equal treatment for different kinds of families and relationships.

1.2.1. Definition of family members

Here, there is considerable variation with respect to the inclusion/exclusion of same sex partnerships in particular, with examples ranging from: recognition of same sex marriage on the same basis as heterosexual marriage (e.g. France, the Netherlands, Sweden); recognition of same sex registered partnerships as equivalent to marriage (e.g. Finland, Ireland); no recognition of same sex registered partnerships in law (e.g. Estonia, Italy, Malta);[15] and express legal designation of marriage as being between a man and a woman only (e.g. Croatia, Poland).

It was noted in Section 1.1 that the position of same sex spouses under the Directive is not yet clear.[16] What can be said, however, is that the rights extended to the same sex partners of Union citizens clearly varies across the Member States, having obvious implications for the exercise of free movement and residence rights – something that is increasingly difficult to reconcile with a status of citizenship in a Union committed to the prohibition of discrimination on the grounds of sexual orientation. Article 2(2) also excludes partnerships contracted outwith the Union Member States. These limitations are amplified by the lesser legal protection extended to partners in a 'durable relationship' under Article 3(2)(b) of the Directive, discussed further in Section 1.3 below.

On the application and interpretation of Article 2(2) – and providing a good example of national responsiveness to the dynamic nature of EU legal change through case law – several reports refer to the removal from national rules of conditions requiring prior lawful residence in the EU for third coun-

14. Cf. the report for Spain, where the annulment of several provisions of the national implementing measure by the Supreme Court is discussed in detail (e.g. to address the exclusion of separated spouses); and the report for Switzerland.
15. Additionally, in some States, there is further potential for confusion where registered partnerships for same sex couples are not recognised in national law and specific conditions exist for recognition of other forms of partnership (see e.g. the discussion on 'common law marriage' in the report for Croatia).
16. This issue has arisen for consideration by national courts in Italy.

try national family members, following the Court's ruling in the *Metock* case.[17] Another theme that emerges in this context is a concern to ensure that family relationships – and marriages in particular – are *genuine* in connection with the interpretation and application of Article 2(2).[18] This issue was also raised in responses to questions about expulsion, and is discussed further in Section 6.2.5 below.

Finally, national courts have also has been engaged in the interpretation of some of the ambiguities of the Directive. The reports for Austria and Croatia note, for example, that the reference to 'direct descendants' in Article 2(2)(c) has interpreted as including grandchildren. In some States, national courts had made relatively generous assumptions that were later circumscribed by Court of Justice case law.[19]

1.2.2. More extensive national protection

There are several examples of States extending more protection than the Directive requires with respect to defining family members. Some reports provide specific examples;[20] but two thematic trends can be discerned more generally.

First, several States extend the scope of the Directive to the family members (irrespective of nationality) of their own *static* nationals, as illustrated below:[21]

17. Case C-127/08 *Metock and others* [2008] ECR I-6241; see e.g. the reports for Denmark, Finland, Ireland, and the UK (however, that report also points to judicial criticism levelled at the UK Government for the slowness of its response).
18. See e.g. the reports for the Czech Republic, Cyprus, Denmark, and the UK. In line with the recognition of cohabiting partners as family members (see below), the report for Sweden outlines related national case law on the definition of 'cohabitant'. Other reports raise the distinction between civil and religious marriage (e.g. the report for France).
19. E.g. in the UK, the Court of Appeal held that dependency could, in its view, arise in the host State i.e. a situation of dependency need not be pre-existing in the country from which a Union citizen's family member has come (*Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1358); but cf. *Reyes*, para. 30. Another example of national/EU judicial divergence can be seen with respect to Article 3(2) of the Directive (e.g. cf. *Aladeselu v Secretary of State for the Home Department* [2013] EWCA Civ 144 and Case C-83/11 *Rahman*, judgment of 5 September 2012, para. 33).
20. E.g. in the report for Bulgaria, it was reported that the legislation transposing Article 2 refers generally to dependent 'descendants' and 'relatives in the ascending order', without the *direct* proviso contained in Article 2(2).
21. The majority of States achieve this through expanding the personal scope of the Directive's implementing measures; but the issues can also emerge through national case law (see e.g. the reports for Cyprus, Poland, and Spain).

STATES THAT DO/DO NOT EXTEND THE SCOPE OF DIRECTIVE 2004/38 TO STATIC NATIONALS*

YES	NO
CROATIA	AUSTRIA
CZECH REPUBLIC	BULGARIA
GREECE	CYPRUS
HUNGARY	DENMARK
ITALY	ESTONIA
PORTUGAL	FINLAND
SLOVENIA	FRANCE
SPAIN	GERMANY
SWEDEN	IRELAND
SWITZERLAND	MALTA
	NETHERLANDS
	POLAND
	UNITED KINGDOM
10 STATES	*13 STATES*

* This map serves for reference and illustrative purposes only and does not reflect accurate geographic scale. It has been produced under the free Creative Commons Attribution-NoDerivs 3.0 Unported License (see http://ppt-toolkit.com).

Noting the endurance of the debate on whether reverse discrimination can and/or should be addressed at EU level, a debate that has only intensified following the ruling in *Ruiz Zambrano*,[22] it is important to remember that through the application of national legal requirements on equal treatment, several States strive to ensure that situations of reverse discrimination will not actually occur in the first place in connection with, primarily, family reunification rights.[23]

Second, several States extend the scope of the Directive to family members other than those specified in Article 2(2) – in essence, collapsing together the different types of families and relationships that are distinguished by Articles 2 and 3 of the Directive in a way that clearly benefits Union citizens. This issue is picked up again in Section 1.4 below but, for example, it was reported that the definition of 'family members' for the purpose of the status and rights conferred by Article 2(2) also includes:

Bulgaria:	'persons in factual cohabitation with a Union citizen'
Denmark:	'a durable relationship under the same roof'
Estonia:	'people who, in the country from which they arrive, are ... members of the household of the Union citizen'
Finland:	'persons living continuously in a marriage-like relationship in the same household regardless of their sex ... if they have lived in the same household for at least two years', with the latter condition not applying 'if the persons living in the same household have a child in their joint custody or if there are other weighty reasons for it'
Hungary:	'the person having parental custody over a minor child who is a Hungarian national'
Slovenia:	'a partner with whom the EU citizen resides in a long-term partnership'
Sweden:	'cohabiting partners'

22. Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177; see e.g. K Hailbronner and D Thym, 'Comment on Case C-34/09 *Ruiz Zambrano*' (2011) 48 CMLRev 1253; H van Eijken and SA de Vries, 'A new route into the Promised Land? Being a European citizen after *Ruiz Zambrano*' (2011) 36 ELRev 704; and F Wollenschläger, 'A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European integration' (2011) 17 ELJ 34.
23. See e.g. the case law on this point discussed in the reports for Cyprus, and Spain.

However, looking across the responses to the questionnaire as a whole, it will become more apparent that when States depart from a literal transposition of the Directive's provisions, they tend on balance to add *more restrictive* than *rights-enhancing* additional national conditions.

Article 3: Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

1.3. Article 3: Introduction

Article 3(1) of the Directive confirms an essential point already mentioned in Section 1.2: that the measure 'shall apply' to Union citizens who move to *or* reside in a Member State other than that of which they are a national, and to their family members per Article 2(2) who accompany *or* join them.

Article 3(2) has a wider personal scope than Article 2; but the rights conferred by its material scope are significantly different. First, on personal scope, the provision applies to 'other family members' who meet specified conditions as well as to the partner (with no reference to gender) with whom a Union citizen has a 'durable relationship'. In Article 3(2)(a), we see a wider understanding of dependency beyond material support, noting the inclusion of 'serious health grounds'. There is also a more general reference to 'members of the household' of a Union citizen who are not subject to any conditions of dependency, the only requirements appearing to be that the connection to the Union citizen was established 'in the country from which [the

members of the household] have come' and that the person is a 'family member' – the precise meaning of which (e.g. objective blood relationship only?[24]) is not specified in the Directive.

Second, as regards material scope, the Directive per se does not apply to persons who meet the personal scope criteria of Article 3(2). Rather, the host Member State is required to 'facilitate' their entry and residence, undertake an 'extensive examination' of their personal circumstances, and justify any denial of entry or residence decisions.

The Court of Justice discussed the scope of Article 3(2) in *Rahman*. There, Article 3(2) was considered to 'impose an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen'.[25] The purpose of the provision was linked to recital 6 of the Directive's preamble i.e. 'to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of family member of a Union citizen contained in Article 2(2) ... but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances'.[26]

The Court then articulated the limits of Article 3(2) and the parameters of related State discretion in more detail. When examining the personal circumstances of an applicant, States should 'take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join'.[27] But the Court acknowledged – noting the reference to 'national legislation' in Article 3(2) – that 'each Member State has a wide discretion as regards the selection of the factors to be taken into account'.[28] In that context, a State may include in its legislation 'particular requirements as to the nature and duration of dependence, in order in particular to satisfy themselves that the situation of de-

24. Cf. the reference in the report for Ireland to a case in which the High Court suggested that 'household' might cover 'an elderly housekeeper now retired who had lived with and been supported by the family over many years and thus was part of the household' (*Wang v MJLR* [2012] IEHC 311, para. 21).
25. Case C-83/11 *Rahman*, judgment of 5 September 2012, para. 22; in para. 25, the Court also confirmed such an applicant's entitlement to judicial review of a refusal decision.
26. *Rahman*, para. 32.
27. *Rahman*, para. 23.
28. *Rahman*, para. 24.

pendence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in the host Member State'.[29] The Court also confirmed that 'the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependent'.[30]

1.4. Transposition, application, and interpretation of Article 3

Picking up on the point made in Section 1.2 on the collapsing together of Articles 2 and 3 of the Directive, it is remarkable to note that several States extend a derived *right* to enter and reside within their territory to persons that fall under the personal scope of Article 3(2)[31] – resulting in considerably stronger legal protection for a much wider range of family members than EU law actually requires. More generally, two key issues emerged: questions connected to the transposition of Article 3(2); and questions that arise because of the discretion inherent in its application.

1.4.1. Transposition

While, once again, no recurring problems with the transposition or application of Article 3 became apparent, specific exclusions from national implementing measures were reported. At the time of reporting, Article 3(2) had not been directly transposed into German or Polish law (but an amendment of the relevant legislation was proceeding through the Polish parliament). In the report for Spain, it was noted that Article 3(2)(a) had not been transposed; and in Estonia and Malta, the reference to partners in a durable relationship in Article 3(2)(b) was excluded.[32]

We also found evidence of additional conditions that appear to go beyond the level of discretion permitted by the Directive (discussed separately below in Section 1.4.2). In the report for Estonia, for example, it is suggested that national law would seem to require 'that a *dependent* person must already have resided together with the Union citizen prior to arriving in Estonia' – a

29. *Rahman*, para. 38.
30. *Rahman*, para. 35.
31. See e.g. the reports for Bulgaria, Denmark, and Estonia.
32. For discussion of a case before the Constitutional Court that similarly ignored the potential implications of Article 3(2)(b) for unmarried partners, see the report for Malta.

requirement that may, it is pointed out, 'prove to be problematic' in light of the Court's decision in *Rahman*.[33] This example reflects the fact that the criteria in Article 3(2) are sequential rather than cumulative – dependent *or* member of household *or* serious health grounds – but that they are not necessarily applied in that way in national law.

Similar examples of additional conditionality can be seen in the reports for Hungary, where it is noted that the national implementing legislation specifies a period of 'at least one year' with respect to dependency or being a household member 'in the country from which they are arriving'; and the UK, where a prior EEA residence requirement had been imposed before the ruling in *Metock*.[34]

1.4.2. The impact of national discretion in practice

Article 3(2) expressly requires that the obligation to facilitate entry and residence rights should be discharged by a State 'in accordance with its legislation'. That requirement – the implementation of which is taken seriously by the Commission[35] – ensures that Union citizens are informed about the procedures that will be applied if they seek such rights in a host State for family members that come within the personal scope of the provision. However, the discretion conferred on the Member States – acknowledged by the Court in *Rahman* – clearly has an impact on the development of citizenship *practice* in reality.

---

33. See the report for Estonia, referring to paras 27-35 of the decision in *Rahman*; see especially, para. 31 ('there is nothing to indicate that the term 'country from which they have come' or 'country from which they are arriving' ['pays de provenance'] used in those provisions must be understood as referring to the country in which the Union citizen resided before settling in the host Member State. On the contrary, it is clear, on reading those provisions together, that the country referred to is, in the case of a national of a third State who declares that he is a 'dependant' of a Union citizen, the State in which he was resident on the date when he applied to accompany or join the Union citizen') and para. 33 ('such ties may exist without the family member of the Union citizen having resided in the same State as that citizen or having been a dependant of that citizen shortly before or at the time when the latter settled in the host State. On the other hand, the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent').
34. The report also notes that this requirement was deemed to be unlawful by national courts, and that the relevant national regulation was subsequently amended.
35. See e.g. the report for Cyprus.

What might constitute a 'durable relationship, duly attested' provides a good example of this. The requirement in Article 3(2) that national authorities 'shall undertake an extensive examination of the personal circumstances' does appear to be widely recognised.[36] And it is not surprising to see that relatively short periods of 'common life' will not be sufficient to constitute the requirement of durability.[37] It is also to be expected that States require more than formal proof in these circumstances. For example, in Hungary, the fact that the Union citizen and the relevant family member have the same registered address will not be enough; instead, the fact that they have been 'living together in one household' for at least one year needs to be verified. The report for Greece details other criteria that can 'serve as proof of the durability of the relationship' i.e. 'the undertaking of shared long-term legal, social or financial commitments (for example, a mortgage to buy a house) ... especially if the EU citizen and his/her partner live under the same roof'.

Beyond more obvious cases, however, we see variation. In the report for Denmark, reference is made to a Supreme Court case[38] in which an Iraqi national failed to demonstrate that he was in a durable relationship with a Union citizen even though, according to the national report, 'it was not disputed that the couple had known each other for at least six years, and had in fact lived together for at least one year. The fact that they had a child together and another to come did not alter this finding'.

But having a child or children together is more decisive, in a positive sense, in other States. For example, referring to a ministerial decision, the report for Greece notes that having or adopting children together means that a durable relationship is then 'irrefutably presumed to exist'. In the report for Hungary, it is noted that, in accordance with a decision of the Supreme Court,[39] a declaration of paternity where the actual paternal relationship has 'no real substantive elements' will not suffice; indeed, it was suggested that claiming residence rights on that basis was 'incompatible with the primary purposes of EU law and national law'. The report for the Netherlands emphasises that, responding to criticism of undue restrictiveness from the Council of State, policy was revised in June 2013 to make it clear that the evidence

36. E.g. the report for Hungary observes that this principle has been recognised by the Supreme Court 'in several judgments'.
37. E.g. the report for France notes two cases in which periods of 'common life' ('*une communauté de vie*') for three and four months were not sufficient.
38. Judgment of the Supreme Court of 24/8/12 in Case 58/2012, reported in U.2012.3399H.
39. Kfv.II.37.566/2011/6.

specified in applicable policy guidance was not to be considered as precluding other means of proof of a durable relationship; rules that *are* specified include cohabitation for six months (demonstrated by a common municipal address registration if the couple cohabited in the Netherlands, or through e.g. a joint lease or utility bills if the couple had cohabited in another country) or having a child together.

Article 5: Right of Entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

1.5. Article 5: Introduction

Article 5 of the Directive outlines formal aspects of the right to enter a host Member State for Union citizens and for third country national family members. The provision captures key principles from the case law, reflecting the fact that the right of entry is communicated rather than constituted by relevant documentary permits.[40] The explicit emphasis on proportionality and implicit concern for respect for family life in paragraphs (4) and (5) signal another important example of this case law-formed approach. Our aim here was to discover if the safeguards established are providing *effective* protection in reality.

1.6. Transposition, application, and interpretation of Article 5

The majority of the national reports confirm that the implementation of Article 5 has been straightforward.[41] Most authors also report that no evidence questioning the effectiveness of the procedures implemented has emerged to date, noting in particular the absence of national case law on these issues. Some reports expressly suggest a positive impact.[42]

The importance of Article 5 for third country national family members is the primary theme that emerges from the data presented. Many reports make express reference to the establishment of an accelerated procedure for the issuing of visas to third country national family members in accordance with

40. See e.g. Case C-459/99 *MRAX* [2002] ECR I-6591, esp. paras 57-61.
41. An exception to this general impression can be seen in the report for Ireland, noting strong judicial criticism of 'the State's implementation and executive application of Article 5 of the Directive' notwithstanding the fact that the actual wording of the implementing measure 'does reflect the provisions of Article 5' (*Raducan v Minister for Justice, Equality and Law Reform* [2011] IEHC 224). See also, the report for Slovenia, where it is noted that the 'procedural safeguards contained in Article 5(4) of the Directive have not been transposed' into national law'; and the report for the UK, noting a preliminary reference currently pending before the Court of Justice (Case C-202/13 *McCarthy and others v Secretary of State for the Home Department*, [2013] OJ C189/6) asking (inter alia) whether 'Article 35 of Directive 2004/38/EC ... entitle[s] a Member State to adopt a measure of general application to refuse, terminate, or withdraw the right conferred by Article 5(2) of the Directive exempting non-national EU family members who are holders of residence cards issued pursuant to Article 10 of the Directive ('residence card holders') from visa requirements'.
42. See e.g. the reports for Austria ('valuable and appropriate'), and Finland ('significant procedural protection').

Article 5(2),[43] and to other preferential procedures that are applied in such cases.[44] In that context, reports also discuss a requirement of proof of the family relationship.[45] Others address the 'reasonable period of time' provided for in Article 5(4).[46]

Additionally, some States implement reporting mechanisms, as permitted by Article 5(5). In the report for Croatia, for example, it is stated that EEA nationals and their family members must 'register their address, temporary residence or permanent residence at the latest eight days from the date of arrival ... or from the change of address, temporary residence or permanent residence'. A fine of HRK 100.00 (approx. €13) applies where there has been a failure to comply with this obligation.

The system outlined in the report for Italy does not establish an *obligation* to report presence within the Italian territory to the police. However, 'if the Union citizen has not reported to the police office, s/he shall be regarded as having stayed in Italy for more than three months, unless s/he can prove otherwise' – a position that has obvious implications for the citizen vis-à-vis the conditions outlined in Article 7 of the Directive, discussed in Section 2 below.[47]

1.7. Question 1 – emerging issues and themes

Directive 2004/38 makes choices when it establishes specific definitions of the concept of **family member**, the political background to which is detailed in the Institutional Report. However, the result is that some types of family

43. See e.g. the reports for Denmark ('not exceeding 15 days unless the situation is exceptional and duly justified'), Finland (reporting evidence from an embassy website that 'processing times for the free visas of EU/EEA citizens' TCN family members varies between 3 to 10 days as compared to the normal 15 days'), and Hungary ('within ten working days').
44. E.g. the report for Finland notes that an oral hearing may be arranged for visa applicants who are third country national family members, which is not part of visa application procedures more generally; decisions denying a visa in such cases are 'more comprehensive' as well as benefitting from 'enhanced legal safeguards in the form of appeals which follow a more thorough and substantial procedure'. See similarly, the report for Sweden.
45. See e.g. the reports for Denmark, and Estonia.
46. See e.g. the report for Greece ('one month').
47. The report also notes that registration with the municipal authority of the place of domicile is also required for residence in Italy for more than three months, an obligation that could similarly, then, be deemed to have been infringed in such cases.

circumstances and relationships are more privileged than others, which may well, to use the language of free movement restrictions, disadvantage certain Union citizens if they choose to move to another State or even deter them from moving in the first place.

Tellingly, the Institutional Report notes that the 'issue of the protection Directive 2004/38/EC should afford to **same-sex relationships and unmarried partners** was the most divisive issue during the discussions in the Council'. The compromise that was adopted raises challenging questions about the locus of responsibility for *pioneering* as well as *reflecting* social change when the equal treatment of Union citizens is clearly at stake. It also suggests a potential gap between EU, ECHR, and national approaches to discrimination that may become even more apparent as the free movement equality paradigm is likely to shift beyond a conventional focus on nationality discrimination to other forms of discriminatory treatment, especially in light of the now-binding effect of the Charter of Fundamental Rights.[48]

The level of **national regulatory discretion** permitted through the application of Article 3(2) is also important to note. The resulting legal distinction between persons that come within the scope of Article 2(2) and Article 3(2) respectively has been characterised as a distinction between members of the 'nuclear family' and 'other family members'.[49] At one level, this approach reflects the fact that Union citizenship and free movement rights more generally involve *shared* EU/Member State competence. But the outcome is that citizens encounter different levels of recognition and protection of their family circumstances in different States – something that the Directive exists precisely to guard against. This issue thus raises one of our Report's central thematic questions about **cultures of citizenship** right from the very outset of the questionnaire i.e. the extent to which citizenship rights are implemented from a *rights*-based or *permission*-based perspective, and the differences that such a choice actually makes to *citizenship practice*.

48. See e.g. the report for Cyprus on this point, in connection with the 'evolving notion and meaning of "family" and "marriage"'; there, it is also noted that the Cypriot Equality Body has acknowledged the discretion conferred on Member States by the Directive, but referred also to 'broader considerations' on the issue of non-discrimination, principally the ECHR, general principles of EU law (including proportionality), and the case law of both the Court of Justice and the European Court of Human Rights.
49. See e.g. AG Mengozzi in *Reyes*, paras 33-37 of the Opinion.

Another dynamic that surfaces in some of the national reports at this stage[50] is the **interplay between national legislative and/or administrative authorities and national courts and tribunals** in the realisation of citizenship rights that comply with EU legal obligations. Significantly, national courts tend to be portrayed, on the whole, as *correcting* errors made in either transposing or applying the Directive. This point leads to two important observations – about the importance of *legal disputes* in the furthering of citizenship rights; but also, about recognising that *relatively few* individuals will actually persist with a legal challenge in the first place – points picked up again in several of the sections that follow.

Finally, while we tend to think of Union citizens as a relatively composite group, what emerges from the data reported is that there are at least **five different groups of Union citizens** that need to be considered: (1) migrant Union citizens residing in host States; (2) migrant Union citizens who have returned to their home States; (3) static Union citizens residing in their home States for whom EU legal protection applies in exceptional circumstances (see further, Section 7.1 below); (4) static Union citizens residing in their home States for whom EU legal protection has been extended by analogy through national law; and (5) static Union citizens residing in their home States for whom no EU protection is relevant. Directive 2004/38 applies directly to Union citizens in category (1) only; primary citizenship rights conferred by the Treaty apply to those belonging to categories (2) and (3).

The implications of this distinction are discussed more fully under Q7 below, but a preliminary comment can be made here. On the one hand, Directive 2004/38 has certainly simplified the 'sector-by-sector, piecemeal approach' (recital 4) previously applied to the regulation of free movement rights, in the sense of consolidating several legislative measures at EU level. But perhaps what we now see is that **a more *substantive* diffusion in the movement and residence status of citizens persists** notwithstanding the simplification of the framework, and thus presenting a different kind of challenge for *stability of residence*. There is a distinction, in other words, between simplification of the *expression* of rights and complexity of their substantive *application.* Life is complicated, and EU regulation of citizenship and free movement rights cannot change this. But it should try to avoid exacerbating it.

50. See e.g. the responses to Question 1 in the reports for Spain, and the UK.

Question 2

Is there any evidence of the expulsion of EU citizens (and/or their family members) on purely economic grounds (i.e. failure to satisfy the conditions set out in Article 7 of the Directive) e.g. in the decisions of national courts and/or tribunals?

Article 7: Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
(a) are workers or self-employed persons in the host Member State; or
(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence;
or
(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3 ...

2.1. Introduction

The conditions for lawful residence in a host Member State for longer than three months create, broadly speaking, two alternate obligations for Union citizens: either being engaged in economic activity (as a worker or self-employed person); or having 'sufficient resources for themselves and their family members not to become a burden on the social assistance system of

the host State' (noting the different phrasing in Article 7(1)(c) for students) as well as 'comprehensive sickness insurance'. The Institutional Report outlines the origins of these conditions in three Directives adopted in the early 1990s that extended free movement and residence rights to Member State nationals who were not economically active, as well as the history of their retention in Directive 2004/38.

It is a general principle of free movement law that the grounds on which a Member State may restrict free movement rights – public policy, public security, or public health – may not be invoked to serve economic ends.[51] That position is affirmed explicitly in Article 27(1) of the Directive,[52] but recital 16 of the preamble is more nuanced:

> As long as the beneficiaries of the right of residence do not become an *unreasonable* burden on the social assistance system of the host Member State they should not be expelled. Therefore, *an expulsion measure should not be the automatic consequence of recourse to the social assistance system*. The host Member State should examine whether it is a case of *temporary difficulties* and take into account the *duration of residence*, the *personal circumstances* and the *amount of aid granted* in order to consider whether the beneficiary has become an *unreasonable* burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against *workers, self-employed persons or job-seekers* as defined by the Court of Justice save on grounds of public policy or public security [emphasis added].

The proportionality principle frames the intended distinction between 'reasonable' and 'unreasonable' burden. Relatedly, Article 14(3) of the Directive confirms that '[a]n expulsion measure shall not be the *automatic* consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State' (emphasis added) – an approach confirmed by the Court in *Brey* through its citation of the criteria listed in recital 16.[53]

The Court emphasised that 'the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member

51. E.g. Case C-35/98 *Verkooijen* [2000] ECR I-4071, para. 48: 'according to settled case law, aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty'.
52. The report for Germany notes that this distinction is also clearly drawn in national law.
53. Case C-140/12 *Brey*, judgment of 19 September 2013, para. 69.

State'.[54] But even accepting that 'the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of [the Directive]',[55] it has to be acknowledged that recourse to the host State's social assistance system *can* be a legitimate factor in expulsion decisions in appropriate cases.[56]

Article 7 should also be read in conjunction with Article 8(4), which provides:

> Member States may not lay down a fixed amount which they regard as 'sufficient resources' but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

In the Institutional Report, the position taken in the Commission's 2009 Transposition Guidelines is reaffirmed i.e. 'the notion of sufficient resources should be assessed against the national criteria to be granted basic social assistance benefit, not any social assistance benefit Member States may provide for in their national laws'.[57] The Court of Justice confirmed this view in *Brey*.[58] Importantly, however, the Court also clarified that 'although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned'.[59]

---

54. *Brey*, para. 75.
55. *Brey*, para. 71.
56. See Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 42 '[t]hat interpretation does not, however, prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it'. See further, however, the report for France, referring to a case in which the *Conseil d'Etat* held that an expulsion decision based on the insufficiency of resources can be taken even if the person concerned has *not yet* resorted to the social security system.
57. The Institutional Report refers to COM(2009) 313 final, at pp. 8-10.
58. *Brey*, para. 67.
59. *Brey*, para. 68. See further, Section 13.4 below.

The requirement of self-sufficiency that Article 7 embodies is one of the most controversial features of citizenship law. As the Court of Justice has acknowledged, the condition of self-sufficiency 'is based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances'.[60] However, recognition of this fact, however politically expedient, clearly challenges the conventional view that aims of a 'purely economic nature' are excluded from consideration as a public interest justification for restrictions on free movement.

At present, the significance of the self-sufficiency requirement and the legitimacy of its various aims have been accentuated by the tenor of political and public debate on intra-EU migration, discussed in more detail below in the discussion on Q15. In connection with Q2, we sought to determine the extent to which a failure to satisfy the conditions set out in Article 7 features in national decision-making on the expulsion of Union citizens from host States, against the backdrop of the framework outlined briefly above – a framework that reflects both a permitted sphere of discretion for the Member States and the determining of the outer boundaries of that discretion through general principles of EU law.

2.2. Article 7 in the context of expulsion

In most of the reports submitted, it is noted that there is no evidence – from reported case law, at least – that decisions on expulsion have been based on purely economic grounds.[61] That does not necessarily mean that the possibility is absent from relevant national rules.[62] But the authors of several national reports distinguish between cases where either a residence permit and/or entitlement to social assistance is denied, on the one hand, and cases that lead to

60. *Brey*, para. 55.
61. See e.g. the reports for Austria, Bulgaria, Croatia, Estonia, Greece, Hungary, Italy, Malta, Poland, Portugal, Slovenia, Spain, and Sweden.
62. See e.g. the report for Finland; the imprint of proportionality is also evident here, however, noting that the prospect of Union citizens and their family members becoming an 'unreasonable burden' on Finland's social security system is characterised by 'resorting *repeatedly* to social assistance' (emphasis added). See also, the reports for France, Germany, and Sweden. Cf. the report for Poland, where it is noted that 'once the card of residence is granted, it may not be retired on economic grounds. The residence card may be annulled only in exceptional cases, namely when it was obtained as a result of submitting false documents or fraudulent information'.

actual expulsion orders on economic grounds, on the other.[63] In the report for the UK, for example, the authors note that:

> The solution adopted by the UK courts is to treat EU citizens who do not enjoy a right of residence by virtue of [Article 7 of the Directive] as simply 'present' in the United Kingdom. That status does not confer any right of residence in the UK under either EU or national law. Such persons are deemed subject to UK immigration control and, therefore, liable to removal by the Secretary of State.

Evidence of clear progression to expulsion decisions on the basis of economic circumstances is provided only in a minority of the reports. The report for Denmark cites information published by a Danish NGO in this context. Similarly, in the report for the UK, and picking up on the text extracted above, the authors point to 'clear evidence of targeted administrative efforts to deport EU citizens from the UK on grounds that are inherently linked to economic considerations ... at least with respect to specific categories of non-economically active EU citizens'. To illustrate the implications of the strategy in practice, 'a pilot scheme aimed at removing homeless EEA nationals from the United Kingdom' is discussed.

Importantly, it was emphasised in several reports that the rationales underpinning expulsion decisions can be blurred together. As the report for Denmark points out, 'some expulsions on grounds of protection of the public order are inherently linked to economic considerations'. In that connection, the report notes that 'fines for minor offences, such as 'squatting' have justified expulsion on grounds of protection of the public order, but were annulled by the Supreme Court'. Similarly, in the report for Sweden, it is noted that '[t]here are for example situations where Union citizens have been expelled from Sweden because of begging or prostitution, in both cases because of dishonest self-support. However, neither begging nor to work as a prostitute is criminal in Sweden'. These issues are picked up again in the discussion on Q6 below.

63. See e.g. the reports for the Netherlands, and the UK. Similarly, in the report for Ireland, reference is made to a decision in which a residence card was denied, but no expulsion order was made because 'the applicant had not established any basis for an Article 7 entitlement' (referring to *Singh and Anor v Minister for Justice, Equality and Law Reform* [2010] IEHC 86).

2.3. Determining self-sufficiency in practice

Short of expulsion scenarios, the responses to Q2 also generated evidence about administrative guidelines and procedures developed for the application of Article 7 in practice. In most of the reports, it was clear that national implementing measures expressly incorporate the obligation to evaluate the personal circumstances of the individual concerned, as required by Article 8(4) of the Directive.[64] In the report for Poland, for example, it is noted that proof of sufficient resources can be demonstrated by means such as the possession of a credit card 'or a certification of having funds at a bank or other financial institution confirmed by a seal and a signature of an authorized officer of the bank or institution, issued one month before submitting an application for registration of stay at the latest'. The report for France is one of the few in which reference is made to administrative guidelines that address the relative comprehensiveness of national/other sickness insurance. That report also alludes to the fact that, as confirmed by EU case law, financial resources can be provided on behalf of the Union citizen by a third person;[65] but the relevant national guidance requires, in such situations, that the Union citizen must justify the sufficiency and duration of such resources.

However, more problematically, it also appears that some States either have in the past imposed or continue to impose minimum quantitative thresholds for the determination of sufficient resources.[66] It can also be seen that additional conditions have been attached to the application of Article 8(3) of the Directive,[67] such as a requirement to submit proof of accommodation.[68] In

64. In the report for the Netherlands, reference was made to a case in which it was held that 'municipalities are under an obligation to assess *themselves* whether the EU citizen has a right of residence. They cannot rely on the residence status as recorded by the immigration authorities' (emphasis in original).
65. E.g. Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.
66. See e.g. the reports for Cyprus, Denmark, and France. These conditions are not necessarily addressed only to citizens who are not engaged in economic activity; see e.g. the report for Cyprus, noting that while the Commission had confirmed (in letters sent to the Cypriot Government) that national law correctly transposed Article 7 of the Directive, 'administrative practice deviates from that by requiring that the workers demonstrate certain income for themselves and their families to recognise their right to residence under art. 7(1)'.
67. With respect to periods of residence longer than three months, Article 8(3) provides: 'For the registration certificate to be issued, Member States may only require that – Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons; – Union citizens to whom

the report for Estonia, for example, the requirement of a registered place of residence as being 'the constitutive element of a Union citizen's right of residence' for periods longer than three months is highlighted as a 'questionable' linkage vis-à-vis the idea of proportionate sanctions for failure to comply with registration procedures suggested within Article 8 of the Directive.[69] The author also recalls recital 11 of the preamble, which states that '[t]he fundamental and personal right of residence in another Member State is conferred directly on citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures'. In contrast, however, the same report also provides a rare example, in this context, of more extensive protection than EU law requires.[70]

The report for Denmark outlines another anomalous national practice: here, it is reported that '[d]ecisions refusing or terminating the right of residence on the specific ground of lack of sufficient resources can only be taken

point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein; – Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources'.

68. E.g. report for the Czech Republic.

69. The first and second paragraphs of Article 8 provide: '1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities. 2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions'.

70. In that report, it is stated that the national implementing measure 'does not lay down any conditions for the right of residence of a Union citizen for more than 3 months in Estonia except the requirement to register one's residence in the population register. This means that the Union citizen does not have to prove employment, sufficient resources or valid health insurance coverage. However, the requirement of sufficient financial resources does come into play when a Union citizen who has come to reside in Estonia wishes to be joined by his family members who themselves are not EU nationals'. This distinction between Union citizens and third country nationals provides an interesting interpretation of the difference between reasonable and unreasonable burdens on the social assistance system.

within the *first 3 months of arrival* and by administrative decision'.[71] But Article 7 of the Directive makes it very clear that self-sufficiency conditions apply only to periods of residence for *longer* than three months.[72]

2.4. Question 2 – emerging issues and themes

Responses to Q2 indicate, overall, a reasonable approach to the evaluation of an individual's economic and personal circumstances and **little evidence that ready recourse to expulsion occurs** where Union citizens cannot demonstrate compliance with the conditions in Article 7 – whatever current political and media rhetoric might suggest. However, such citizens can be left in an **unstable liminal legal space** in consequence: 'present' but not lawfully resident in the host State, under EU or national law, until or unless the authorities do progress to issuing a residence permit – or making an expulsion order. Some of the issues raised thus provide a preliminary indication of **concern about the appropriate exercise of State discretion in the sphere of expulsion** – a point addressed in detail in Section 6 below.

The way in which Article 7 is being applied in practice also raises important questions about the **extent to which administrative practices conform** to the framework established by the Directive, as fleshed out by the case law of the Court of Justice. A related issue concerns how (or even whether) judicial interpretation of the Directive's concepts and definitions properly filters down to national authorities other than courts or tribunals. A directive can never capture each and every circumstantial nuance that might be relevant; but there is a question about **whether even *core* concepts – such as 'sufficient resources' – might need to be further developed or elaborated in follow-up legislation** in order to ensure a greater degree of consistency of application and interpretation at national level.

The data presented in the national reports on this issue also **reinforces more general patterns already identified for Q1** – (1) *pockets* of problems that are often *specific* to individual Member States rather than more widespread or systemic transposition failures; (2) the imposition of, on balance, more *rights-limiting* than rights-expanding national conditions, even where such conditions would seem to be precluded by the wording of the Directive

71. Report for Denmark (emphasis in original), referring to Section 28 of the Aliens Act of 2013.
72. See also, the report for France, referring to concerns outlined in a report by Human Rights Watch on this point.

itself; and (3) the critical importance of *judicial review* in terms of redressing problematic procedures that restrict the scope of the Directive – and thus the implementation of citizenship rights – in practice.

Question 3

How have Articles 12-15 of the Directive been transposed into national law? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?

Article 12: Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. 'Sufficient resources' shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13: Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or
(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or
(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

Article 14: Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or
(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15: Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

3.1. Introduction

The protection guaranteed by Articles 12-15 of Directive 2004/38 marks a critical advance for protection of the retention of residence rights in a host State, especially in light of our thematic focus on *stability* of residence. The provisions are, in essence, about the consequences for residence status when

life intervenes – and they have particular implications for third country national family members.[73] In that context, the statement in Articles 12(3) and 13(2) that '[s]uch family members shall retain their right of residence on a personal basis' signals a path-breaking shift from the standard derived rights paradigm.

Reflecting both the simplifying and strengthening aims of the Directive, the provisions construct a detailed framework that clearly exceeds the piecemeal guidance it replaces – with respect to both repealed legislative measures[74] and relevant case law.[75] The particular position of jobseekers, raised in Article 14(4), will be picked up in the discussion on Q5 below.

3.2. Articles 12-15: transposition, application, and interpretation

Overall, the responses to Q3 indicate that Articles 12-15 have been correctly transposed into national law.[76] In fact, the reports often use terms such as 'faithfully', 'fully', 'identical', 'literal' or 'reproducing' vis-à-vis the wording of the provisions. Additionally, we found several instances of where national implementing measures provide even more extensive protection than required by the Directive.[77] Respect for family life emerges as the common linking thread in that respect. Few reports indicate that Articles 12-15 have been considered in national case law.[78]

---

73. For an example of contrasting interpretations – and outcomes –before the adoption of the Directive, cf. the judgment and Opinion in Case C-257/00 *Givane* [2003] ECR I-345.
74. See e.g. Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, [1970] OJ L142/24; and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, [1975] OJ L14/10.
75. E.g. on the position of separated spouses, see Case 267/83 *Diatta* [1985] ECR 567 and Case C-370/90 *Singh* [1992] ECR I-4265; for discussion of the retention of residence rights in the event of divorce, see Case C-413/99 *Baumbast and R* [2002] ECR I-7091 (which also addresses the situation in which the Union citizen departs from the host State).
76. Cf. the report for Switzerland.
77. For example, in the report for Hungary; cf. three years in Article 13(2)(a) of the Directive and two years in the national measure. See also, the reports for Ireland, Italy, and Portugal.
78. But see e.g. the reports for France, and Ireland.

However, other reports identify transposition problems that relate to differences between either the Directive and national law or Court of Justice judgments and national law. In particular, the report for Bulgaria outlines a cluster of inconsistencies between the provisions of the Directive and the national implementing measures. For example, the self-sufficiency requirement in Articles 12(2) and 13(2) of the Directive has also been applied to the transposition of Article 12(3) – even though the latter provision makes no reference to that requirement, a point confirmed in the case law of the Court of Justice.[79] Relatedly, the national implementing measure in France defines 'completion of studies' as the completion of secondary school education, providing another example of a national condition at odds with the jurisprudence of the Court.[80] The report for Poland provides a contrasting example on this point.[81]

In Italy, the national implementing measure constrains the scope of Article 13(2)(c) by imposing an additional condition requiring national criminal proceedings.[82] A generally strict approach to the same provision is also highlighted in the report for the UK, this time in connection with a requirement to demonstrate self-sufficiency.[83]

79. See e.g. Case C-310/08 *Ibrahim* [2010] ECR I-1065, paras 48-50; cf. the reports for Denmark and the UK on this point.
80. See e.g. Case C-529/11 *Alarape and Tijani*, judgment of 8 May 2013, especially paras 25 ('since, according to the Court's settled case-law, the scope of Article 12 of Regulation No 1612/68 extends also to higher education, the date on which a child completes his or her education may lie after reaching the age of majority') and 28 ('as regards the derived right of residence of a parent who cared for a child who has reached the age of majority and who is exercising the right to continue his/her education in the host Member State, the Court has held that, although that child is in principle assumed to be capable of meeting his or her own needs, the right of residence of that parent may nevertheless extend beyond that age, if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education').
81. There, it is stated that the implementing measure 'takes into account widely understood education, both obligatory education at school as well as studies, which seems to be connected with higher education at the university'.
82. Article 13(2)(c) has been transposed in Italy as requiring that 'the concerned person is the offended party in criminal proceedings, pending or defined by a judgment of conviction for crimes against the person committed within the family'.
83. See the report for the UK, including references to relevant national case law; cf. the finding that a third country national 'who had obtained a retained right of residence following divorce did not lose that right if he subsequently ceased to be employed or self-employed' (referring to *Samsam v Secretary of State for the Home Department* [2011] UKUT 165 (IAC)).

Most national reports confirm appropriate transposition of the procedural safeguards enshrined in Article 15 of the Directive. However, a problem in this respect is identified in the report for the UK, concerning 'access to appeal rights for family members in specific instances' and a requirement of proof of the family relationship before a right to appeal is granted. The report notes that this practice was highlighted by the Commission in its 2008 report on the application of the Directive, but points out that '[t]hese issues are yet to be addressed by the UK'.

Linking back to the discussion on Q1, and to Sections 1.2.1 and 1.7 in particular, some reports raise questions about the uncertain legal position of same sex partners who do not fall within the scope of Article 13(2).[84] In that context, the extension of the scope of Article 13(2)(a) by a national court in the Netherlands to 'unmarried third country national partners of EU citizens' who can establish that they were in 'a durable relationship for at least three years with an EU citizen, at least one of which was spent living legally in the Netherlands' provides a welcome example of good practice aimed at the achievement of effective equal treatment at national level.[85]

Finally, and picking up on another theme noted in Section 1.2.1, a concern to ensure that family relationships are *genuine* re-emerges in some reports under Q3 too, reflecting State concerns to identify possible cases of abuse of EU rights.[86]

3.3. Question 3 – emerging issues and themes

Broadly speaking, the responses to this question indicate a strong standard of rights recognition at the national level with respect to Articles 12-15 of the Directive – which may be connected to the **degree of detail specified** in these provisions.

84. See e.g. the reports for Cyprus, the Czech Republic, and the Netherlands (where it is reported that 'the Netherlands has explicitly chosen to treat the non-registered partners of EU citizens in a similar way to spouses or registered partners').
85. Cf. however, the report for the UK, where national case law has confirmed that the rights conferred on third country nationals by Article 13 of the Directive 'apply only to the dissolution of marriages/civil partnerships and not with respect to durable relationships'.
86. See e.g. the report for Finland; however, the report for Ireland indicates that marriages of convenience were deemed to be lawful under Irish law by the High Court in *Izmailovic v Minister for Justice, Equality and Law Reform* [2011] 2IR 522, paras 22-36.

Confirming themes already identified, the **broad picture of transposition** could be summarised as follows: appropriate implementation of the Directive overall, with consistent examples of *both* more extensive protection *and* problematic additional conditions (or failure to transpose at all) too. A positive conclusion that can be drawn from this depiction is that we are not, on the provisions analysed thus far at least, dealing with widespread or *systemic* transposition breakdown. But there is perhaps a more problematic side to the patchy and fragmented picture that results too: fundamentally, how should this ***range* and *variety* of transposition problems be *monitored* and *addressed* effectively** by the EU institutions?

Question 4

How have Articles 16-21 of the Directive been transposed into national law? Has data on the volume of permanent residence been published for your Member State? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?

Article 16 (Permanent residence): General rule for Union citizens and their family members

1. Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17: Exemptions for persons no longer working in the host Member State and their family members

...

Article 18: Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

4.1. Introduction

Permanent residence is one of the most significant innovations of Directive 2004/38. Recital 17 of the preamble proclaims an intention that permanent residence 'would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion'. In essence, the status attributes significance to the fact that an extended period of residence in a host State – a continuous period of five years, in accordance with conditions and exemptions laid down in the Directive – generates a *degree* of integration that should be recognised in a distinctive way.

Two concrete examples of that distinctiveness are provided by the fact that, first, the right to permanent residence is not subject to the conditions in Chapter III of the Directive – including the obligation to be either economically active or self-sufficient – and, second, permanent residents benefit from a greater level of protection against expulsion under Article 28(2), discussed in more detail for Q6 below. Further reflecting the sense that Directive 2004/38 signals an inclination towards more autonomous rights for family members in certain circumstances, it is significant that 'family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years' (Article 16(2)) also acquire the right of permanent residence there.

Conditions regarding permitted interruptions to continuity of residence are outlined in Article 16(3) and, according to Article 16(4), the right will be lost only through absence from the host State for a period exceeding two consecutive years. Articles 17 and 18 set out a series of exemptions and other conditions e.g. relating to acquisition of the right before five years in certain cases, and Articles 19-21 outline relevant administrative formalities.

Early case law on permanent residence addressed whether or not periods of legal residence completed in States prior to the expiry of the transposition period for Directive 2004/38,[87] as well as prior to the accession of the host State to the Union,[88] could be counted towards the acquisition of permanent residence – with both points responded to positively by the Court of Justice, on the basis that concluding otherwise would deprive the relevant rights of their effectiveness.

The meaning of 'residing legally' has come under scrutiny more recently. In *Ziolkowski and Szeja*, the Court held that the wording of Article 16(1) 'does not give any guidance on how the terms "who have resided legally" in the host Member State are to be understood' but that, equally, the Directive 'does not contain any reference to national laws as regards the meaning of those terms either'.[89] The Court thus reasoned that legal residence had to be considered as 'an autonomous concept of European Union law which must be interpreted in a uniform manner throughout the Member States'.[90] Drawing from the general scheme of the Directive, the Court held:

> [T]he concept of legal residence implied by the terms 'have resided legally' in Article 16(1) ... should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1). Consequently, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a 'legal' period of residence within the meaning of Article 16(1).[91]

The Court was careful to point out that its approach does not preclude the application of more favourable national provisions.[92] However, as a matter of EU law, periods of residence in which the self-sufficiency conditions in Article 7(1) are not met cannot then be counted towards the acquisition of permanent residence.

Another dimension of this issue concerns periods of imprisonment in a host State. In *Onuekwere*, the Court considered the question with respect to third country national family members of Union citizens. First, it reasoned

87. Case C-162/09 *Lassal* [2010] ECR I-9217.
88. Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, judgment of 21 December 2011; Joined Cases C-147/11 and C-148/11 *Czop and Punakova*, judgment of 6 September 2012.
89. *Ziolkowski and Szeja*, para. 33.
90. *Ziolkowski and Szeja*, para. 33.
91. *Ziolkowski and Szeja*, paras 46-47.
92. *Ziolkowski and Szeja*, para. 50.

that the acquisition of permanent residence by family members 'is dependent ... not only on the fact that the Union citizen himself satisfies the conditions laid down in Article 16(1) ... but also on the fact that those family members have resided legally and continuously 'with' that citizen for the period in question, the word "with" reinforcing the condition that those family members must accompany or join that same citizen'.[93] The Court went on to emphasise the *integration* of the individual into host State society as a 'precondition' for acquiring permanent residence rights, and thus concluded:

> Such integration ... is based not only on territorial and temporal factors but also on qualitative elements, relating to the *level* of integration in the host Member State ... to such an extent that the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence *even outside the circumstances mentioned in Article 16(4) of Directive 2004/38* ... The imposition of a prison sentence by the national court is such as to show the *non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law*, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence ... would clearly be contrary to the aim pursued by [Directive 2004/38] in establishing that right of residence [emphasis added].[94]

The same analysis would presumably apply if the applicant were a Union citizen.[95]

The Court is clear about the fact that it is introducing a precondition 'outside the circumstances' of the Directive – notwithstanding the stipulation in Article 21 TFEU that conditions placed on citizenship rights must be *laid down* in either the Treaty or secondary legislation. Moreover, within the text extracted above, we can see potential for other restrictions to be placed on the acquisition of permanent residence i.e. imprisonment being just one example of a situation that could be seen as an 'undermining of the link of integration'. An illustration is provided by one of the questions recently sent by the High Court in Ireland for a preliminary ruling:

---

93. Case C-378/12 *Onuekwer*e, judgment of 16 January 2014, para. 23.
94. *Onuekwer*e, paras 25-26. On the same basis, the Court also clarified that imprisonment interrupts the 'continuity of residence' demanded by Article 16(2) and (3) of the Directive.
95. On the application of *Onuekwer*e to Article 28(3) of the Directive in a case concerning a Portuguese national residing in the UK, see Case C-400/12 *MG*, judgment of 16 January 2014.

Can it be said that the spouse of an EU national who was not at the time himself a national of a Member State has 'legally resided with the Union citizen in the host Member State for a continuous period of five years' for the purposes of Article 16(2) of Directive 2004/38/EC2, in circumstances where the couple had married in May 1999, where a right of residency was granted in October 1999 and where by early 2002 at the absolute latest the parties had agreed to live apart and where both spouses had commenced residing with entirely different partners by late 2002?[96]

That question seeks to tease out the significance of residing 'with' the Union citizen – a seemingly simple expression that could turn out to have serious consequences here and in similar cases.

Another dimension of the decision in *Onuekwere* worth noting is the Court's reference to the 'strengthen the feeling' phrase from recital 17. The Court referred to recital 17 for the first time in *Lassal*, but there, in order to apply a broad reading of the objectives and purpose – and thus of the conditions underpinning the acquisition – of permanent residence.[97] In *Onuekwere,* Advocate General Bot drew from the same words to contextualise his view that 'citizenship is for the citizen a guarantee of belonging to a political community under the rule of law'.[98] In its judgment, the Court used recital 17 to claim that the 'EU legislature *accordingly* made the acquisition of the right of permanent residence ... subject to the integration of the citizen of the Union in the host Member State'.[99]

The invocation of recital 17 in this manner raises two key questions of interest for present purposes. First, in what ways does the status of permanent residence engender a *second tier* of Union citizenship *beyond* the pointers specified in the Directive, such as enhanced protection against expulsion and entitlement to social assistance in a host State? To what extent should it? How does the ethos of *strengthening the feeling* of Union citizenship differ (if at all) from the Court's classic characterisation of citizenship as the *fundamental status* of Member State nationals?[100] Second, if permanent residence cannot be accrued because of non-compliance with 'the values expressed by the society of the host State in its criminal law', there is a potentially broader link here between the specific question of permanent residence and the treatment of criminal convictions more generally in the context of Member State expulsion practices – and, relatedly, between how State and EU policies and

96. Case C-244/13 *Ogieriakhi*, pending; see [2013] OJ C189/12.
97. *Lassal*, paras 32 and, in particular, 53.
98. AG Bot in *Onuekwer*e , paras 51-52 of the Opinion.
99. *Onuekwer*e , para. 24 (emphasis added).
100. See e.g. *Grzelczyk*, para. 31.

practices flow backwards and forwards from one level to the other. This issue will be picked up again below in the discussion on Q6. But here, alongside the ongoing process of judicial interpretation of the scope of permanent residence at EU level, we sought through Q4 further to enhance understanding of the right by looking at its transposition, application, and interpretation at national level since the entry into force of the Directive.

4.2. Transposition, application, and interpretation of permanent residence

The data collected suggest that, on the whole, there has been appropriate transposition of the substantive elements of the right to permanent residence – i.e. Articles 16-18 – and, once again, it is perhaps useful to recall that these provisions of the Directive are quite detailed. Additionally, several reports included specific comments about the provisions on administrative formalities i.e. Articles 19-21.

4.2.1. Permanent residence: substantive rights

We found some evidence of the shift in mindset that the status of permanent residence is intended to effect. For example, the report for Finland discusses a case in which the Supreme Administrative Court held that an Italian national who had resided lawfully in Finland for more than five years was no longer required to register his residence there since 'an *ipso jure* right of permanent residence existed, and a document certifying this [could] be issued upon application'. This approach reflects very well the notion that permits merely evidence rather than confer EU rights.[101] Similarly, national courts in the UK have held that 'a right to permanent residence ... cannot be lost even by significant periods of imprisonment'.[102]

In some reports, the requirement and/or the task of demonstrating compliance with the condition of 'legally residing' in the host State was highlighted; and it is not uncommon to observe that a strict approach is taken by national authorities in this context. In the report for the UK, for example, the authors refer to a case in which a claim for permanent residence 'was rejected on the basis that the applicant's sickness insurance *complemented* rather than *re-*

101. See similarly, the cases outlined in the report for Sweden.
102. Report for the UK, referring to *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199, in which the Court of Appeal referred to the Court of Justice's decision in Case C-145/09 *Tsakouridis* [2010] ECR I-11979.

placed all services provided by the UK's publicly-funded National Health Service'.[103] In the report for the Netherlands, however, it was stated that '[l]egal residence for a continuous period of five years is presumed if the relevant authorities have not withdrawn the residence permit'.

There are also instances of more extensive protection being extended under national rules than the baseline set subsequently by EU law. For example, it was interesting to note that national 'practice assimilates imprisonment to lawful residence' in Denmark, a point that has now, as discussed in Section 4.1, been determined to the contrary by the Court of Justice. The same issue is discussed in the report for the UK, where the authors refer to several decisions in which national courts ruled that periods of imprisonment do *not* count towards the acquisition of 'legal' residence under Article 16 of the Directive. However, the authors do note that the reference in *Onuekwere* – seeking definitive clarification of this issue – came from a tribunal in the UK, notwithstanding the approach taken consistently in national case law.

The importance of guidance from the Court of Justice on the interpretation of the Directive is further shown by contrasting a case outlined in the report for Ireland with the reasoning of the Court on the same question i.e. counting periods of residence in a host State prior to the accession of the State of nationality to the EU.[104] In the report for the UK, however, the approach of the national courts to periods of residence that do not comply with the requirements of the Directive reflects the reasoning of the Court more closely. Importantly, the UK courts distinguish between lawful residence under national law or under *other* frameworks of EU law, on the one hand, and lawful residence under the Directive, on the other. This issue is discussed in more detail under Q7 below.

Transposition, application, and interpretation anomalies can, of course, stem from ambiguities in the Directive itself. The potential significance of residing 'with' a Union citizen for the purposes of Article 16(2) was raised in Section 4.1 above, noting a preliminary reference from Ireland currently pending before the Court of Justice. A national court in the UK has ruled that 'spouses who derive residence rights from a working or self-sufficient Union citizen do not have to live in the matrimonial home with that citizen in order

103. Report for the UK (emphasis in original), referring to *FK (Kenya) v Secretary of State for the Home Department* [2010] EWCA Civ 1302. The authors also note that the UK's 'refusal to view NHS provision as 'sufficient medical insurance' in relation to Union citizens is currently the subject of infringement proceedings'.

104. Cf. the decision in *B v Minister for Justice, Equality and Law Reform* [2009] IEHC 447, paras 18-20, with the ruling in *Lassal.*

for the residence to be "legal" under Art 16'.[105] But the issue is raised in a different context in the report for Croatia – since Article 18 of the Directive has not been transposed into national law, the author suggests that it is unlikely that family members claiming rights on the basis of Articles 12(2) and 13(2) could then be granted a right to permanent residence in Croatia in consequence.

Providing an example of additional conditionality at national level, the significance of having a registered place of residence in Estonia has consequential implications for the acquisition of permanent residence too: 'the concept of legal residence ... in Art 16(1) of the Directive can, in the context of the [implementing measure], be construed to mean having a registered place of residence in Estonia according to [national law]'. In the report for Slovenia, the issuing of a permanent residence permit is made subject to a series of conditions – some of which (e.g. 'if there are no grounds to believe that his residence in the country *would be associated* with terrorist or other violent acts, illegal intelligence activities, trafficking in drugs, or with the commission of any other criminal acts') differs from the imprisonment situation considered by the Court in *Onuekwere*. However, it is a useful illustration of a point made in Section 4.1 above: the fact that a broader test – i.e. 'the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law' – is contained within the judgment.

Finally, some reports again raised the issue of less favourable treatment of different categories of family members. For example, in the report for Denmark, it was noted that national rules require a third country national family member who has acquired a right of permanent residence to demonstrate that they can support other third country national family members who seek to join them; whereas family members have an unconditional right to reside with a permanently resident Union citizen.[106] Other reports discuss the situation of family members who do not fall within the scope of Article 2(2) of the Directive, especially same sex partners in a durable relationship with a Union citizen.[107]

105. See the report for the UK, referring to *PM (Turkey) v Secretary of State for the Home Department* [2011] UKUT 89 (IAC).
106. Report for Denmark, referring to the contrasting decision of the EFTA Court in Case E-4/11 *Clauder* with respect to the situation of Union citizens.
107. See e.g. the report for Croatia; cf. the more extensive scope outlined in the reports for Finland, and the Netherlands.

4.2.2. Procedural rights

Broadly speaking, national procedures either comply with or surpass the requirements of the Directive in terms of the specifications on timing. For example, in the report for Bulgaria, it is noted that permanent residence cards are issued 'on the same day' for Union citizens (cf. Article 19(2) of the Directive – 'as soon as possible') and 'within one month' for family members who are not Union citizens (cf. Article 20(1) – 'within six months').[108] But transposition anomalies emerge here too. For example, even with respect to the clear and unambiguous statement in Article 20(1) that a permanent residence card 'shall be renewable automatically every ten years', the Netherlands has transposed the point of renewability as five years.

The option of applying 'proportionate and non-discriminatory sanctions' in cases of failure to apply for a permanent residence card before the current residence card expires – provided for in Article 20(2) – has been realised in practice. Some States have implemented specific sanctions in this respect; others take a more general approach. For example, the report for Bulgaria notes that the national implementing act 'does not lay down specific sanctions for failing to apply for a permanent residence card but stipulates instead that 'minor' violations of the [act] shall be subject to a fine of [approx. €10]'. This contrasts sharply with the enactment of a specific penalty in Cyprus of 'up to 1500 Cypriot pounds' – which amounts to approx. €2500 and thus seems unlikely to stand as a 'proportionate' sanction.

Noting that Article 21 of the Directive provides that 'continuity of residence may be attested by any means of proof in use in the host Member State', some reports also provided examples of the types of evidence that would normally be used – including e.g. work or rental contracts.[109] It is important to reiterate the general convention that administrative guidance can provide examples of evidence that are indicative only and may not exclude consideration of other documents or forms of evidence not specified.[110] However, national rules in Denmark expressly provide that permanent residence

108. See also e.g. the report for Finland, where it is noted that '[i]n 2012, the average time of processing EU citizens' documents on permanent residence was 14 days and for TCN family members 43 days', and the report for Spain (three months for third country national family members).
109. See e.g. the report for Austria; see similarly, the report for the Netherlands, noting that 'the liberal rules on evidence generally adhered to in Dutch administrative law apply'.
110. On this point, see the report for Cyprus.

ends where it has been achieved through fraudulent means (e.g. 'marriage of convenience or false declaration').[111]

Finally, most of the reports include data on applications for permanent residence cards.[112] It is difficult to extract general themes on this point, since the data provided differ in several key respects e.g. the time period covered. But some interesting points of comparison can be noted nonetheless. Some States provide information on an annual basis,[113] while others publish updated data more regularly.[114] Some States publish data on both successful and unsuccessful applications,[115] while others publish the former only.[116] One statistic stands out from the report for Finland, however: in 2011 and 2012, applications for permanent residence amounted to just 0.5% 'of all alien licenses and permits'.[117]

4.3. Question 4 – emerging issues and themes

The issues discussed in connection with the right of permanent residence provide an interesting bridge between Q4 and the preceding questions, on the one hand, and Qs5-8 below, on the other, in two key respects. First, the patterns and themes that emerge from the national reports on the transposition, application, and interpretation of Articles 16-21 **mirror in several respects the patterns and themes already established** for Qs1-3. For example, it is confirmed once again that detailed legislative provisions do not preclude transposition anomalies altogether – whether these result from clearly divergent (and thus presumably deliberate) national transposition choices or ambiguities inherent in the EU measure itself. However, where a greater *degree* of

111. See similarly, the report for Hungary.
112. In the report for Greece, it is noted that data on applications for permanent residence submitted by EU citizens are not published, in contrast to applications from third country national family members; the author traces this distinction to the 'fragmentation of powers and competencies' for the two groups between two different national authorities.
113. See e.g. the report for Hungary.
114. See e.g. the report for the Czech Republic, referring to the publication of monthly statistics online; and the report for Spain ('every three months').
115. See e.g. the report for Finland, and the report for the UK (which also discusses statistics on 'invalid' applications).
116. See e.g. the report for Spain.
117. In the report for Slovenia, it is reported that EEA residence permits amounted to 'slightly over 3% of all permanent residence permits issued in 2012'.

detail is specified in the EU provisions, a correspondingly higher degree of transposition compliance can generally be seen too.

Second, the responses to Q4 also raised the **importance of the interpretative guidance provided by the Court of Justice**. This becomes the focus of attention in Qs5-7, where we first explore the interplay between case law and certain provisions of the Directive (on equal treatment and expulsion) but then move on to consider how national authorities receive and apply case law guidance on citizenship rights *beyond* the Directive altogether – looking, in that context, at case law that draws directly from the rights conferred by Articles 20-21 TFEU in connection with, first, residence rights for third country national family members – on which various concerns have already been raised under most of the questions discussed thus far – and, second, the shaping of national rules on loss (and acquisition) of nationality.

Question 5

How has Article 24(2) of the Directive been transposed into national law? Does national law distinguish between the categories specified in Article 24(2) and jobseekers in terms of entitlement to social benefits? Has Article 24(2) displaced the Court of Justice's 'real link' case law before national courts or tribunals?

Article 24: Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

5.1. Introduction

Article 24(1) of the Directive confirms the fundamental commitment to equal treatment expressed in Article 18 TFEU: a principle of non-discrimination on the grounds of nationality, with host State nationals as the relevant comparator group. Importantly, and again mapping the Directive's incremental enhancement of rights beyond the derived rights paradigm, Article 24(1) also establishes that '[t]he benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence'.

By focusing here on the derogation outlined in Article 24(2), however, we sought, in particular, to gain greater understanding of, first, how case law shapes the application and interpretation of the Directive, and, second, how national authorities actually manage the resulting *hybridity* of legal sources.

The wording of Article 24(2) is clear. It establishes that a Member State is not obliged to confer any entitlement to social assistance (1) during the first three months of residence; or (2) cross-referencing to Article 14(4)(b), where 'the Union citizens entered the territory of the host Member State in order to seek employment' and noting that 'the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine change of being engaged'. Article 24(2) further provides that prior to the acquisition of permanent residence, a Member State is not obliged to provide maintenance aid for studies 'to persons other than workers, self-employed persons, persons who retain such status and members of their families'. However, case law – both prior to *and* after the entry into force of the Directive – has established broader principles.

First, with respect to social assistance generally, the Court held in *Trojani* that while Member State nationals who are neither economically active nor self-sufficient could not derive a right to reside in another State from Union law 'for want of sufficient resources ... a citizen of the Union who is not economically active may rely on [Article 18 TFEU] where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.[118] On that basis, the Court concluded that 'national legislation [which] does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State,

118. Case C-456/02 *Trojani* [2004] ECR I-7573, paras 36 and 43 respectively.

constitutes discrimination on grounds of nationality prohibited by Article [18]'.[119]

Second, the position of jobseekers has long been – and continues to be – treated distinctively. Their status under EU law can be traced in three key stages. Before the adoption of the Directive, the test captured by Article 14(4)(b) was developed by the Court in *Antonissen*, which established that jobseekers came within the personal scope of what is now Article 45 TFEU.[120] Next, following the creation of Union citizenship but before the adoption of the Directive, the Court took a mixed approach to personal scope in *Collins*, finding that:

> In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment *enjoyed by citizens* of the Union, it is no longer possible to exclude from the scope of *Article [45](2)* [TFEU] – which expresses the fundamental principle of equal treatment, guaranteed by Article [18 TFEU] – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.[121]

The Court confirmed that a test linking entitlement to jobseeker's allowance with a habitual residence requirement amounted to indirect discrimination and could be justified 'only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions'.[122] On the first point, the Court confirmed that 'it may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State'.[123] The Court also provided a framework for assessing the proportionality of such a test:

> [I]ts application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy

119. *Trojani*, para. 44.
120. Case C-292/89 *Antonissen* [1991] ECR I-745.
121. Case C-138/02 *Collins* [2004] ECR I-2703, para. 63 (emphasis added).
122. *Collins*, para. 65.
123. *Collins*, para. 69.

themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.[124]

The referring court in *Vatsouras and Koupatantze* explicitly queried the compatibility of the restriction laid down in Article 24(2) of the Directive with Article 18 TFEU, bearing in mind the case law summarised above. Affirming the principles established in *Collins*, the Court held that 'the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with Article [45(2) TFEU]' – with the result that, in its view, '[b]enefits of a financial nature which, *independently of their status under national law*, are intended to facilitate access to the labour market *cannot be regarded as constituting "social assistance"* within the meaning of Article 24(2) of Directive 2004/38'.[125]

Finally, third, the granting of maintenance aid to students can be linked to two different lines of case law. When migrant students who are lawfully resident in accordance with *national* law claim entitlement to the general social assistance system of a host State, they fall under the *Trojani* framework, as summarised above.[126] Additionally, however, the Court confirmed in *Bidar* that the creation of Union citizenship means that 'the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of [Article 18 TFEU] for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs'.[127] Here, the Court focused on a different kind of 'genuine link' when compared to the labour market connections relevant for jobseekers, confirming that 'it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated *a certain degree of integration into the society* of that State'.[128]

Soon after the adoption of the Directive, but before its entry into force, it appeared that the Court was abandoning this *qualitative* understanding of integration – necessarily assessed on a case-by-case basis – to a more rigid five-

124. *Collins*, para. 72.
125. Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paras 44-45 (emphasis added).
126. See e.g. Case C-184/99 *Grzelczyk* [2001] ECR I 6193.
127. Case C-209/03 *Bidar* [2005] ECR I-2119.
128. *Bidar*, para. 57; the Court also held that residence requirements could capture the relevant 'guarantee of sufficient integration into the society of the host Member State' (para. 60).

year rule, mapping the text of Article 24(2).[129] However, when national rules do not fit directly with the express exclusions listed in that provision, the 'genuine link' approach will still be applied. Indeed, in *Prinz and Seeberger*, the Court recently expanded on both the meaning of this test and how to demonstrate its fulfilment:

> [T]he proof required ... must not be too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection between the claimant and this Member State, to the exclusion of all other representative elements ... Although the existence of a certain level of integration may be regarded as established by the finding that a student has resided in the Member State where he may apply for an education or training grant for a certain period, a sole condition of residence ... risks ... excluding from funding students who, despite not having resided for an uninterrupted period of three years in [the State] immediately prior to studying abroad, are nevertheless sufficiently connected to [that] society. That may be the case where the student is a national of the State concerned and was educated there for a significant period or on account of other factors such as, in particular, his family, employment, language skills or the existence of other social and economic factors.[130]

Relatedly, the Court has stressed that Article 24(2), as a derogation from the principle of equal treatment, must be interpreted narrowly. It therefore held in *Commission v Austria* that while reduced transport fares granted to certain students did 'constitute maintenance aid for them, only maintenance aid for studies "consisting in student grants or student loans" come within the derogation from ... equal treatment provided for in Article 24(2)'.[131] The Court has also adopted a generous approach to the definition of a worker in this context, preserving the special position created by Article 24(2) for the economically active vis-à-vis entitlement to study grants.[132]

All in all, by layering the multiplicity of principles established through case law *over* the wording of Article 24(2) of the Directive, a complicated picture of entitlement to social assistance is constructed. Social security systems across the Member States already differ in fundamental respects. Rules

129. Case C-158/07 *Förster* [2008] ECR I-8507.
130. Joined Cases C-523/11 & C-585/11 *Prinz and Seeberger*, para. 42, paras 37-38.
131. Case C-75/11 *Commission v Austria*, judgment of 4 October 2012, paras 54-55.
132. See e.g. Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187; and Case C-46/12 *LN*, judgment of 21 February 2013. The latter was described as a 'shock for politicians' in the report for Denmark, which also notes that the ruling 'reactivated in the media fears of social tourism with its waves of students especially from Eastern EU-countries invading Danish universities' – these issues are picked up again in the discussion on Q15 below.

on access to benefits that qualify as 'social assistance' are scattered across different measures and different processes within those systems. The national legal frameworks that are relevant or potentially relevant here can therefore seem maze-like even when taken on their own; aiming to compare them brings an additional challenge. We have thus focused our remarks in this section on specific issues connected to Article 24(2) only, exploring the extent to which the complexity of the blended Directive/case law framework also affects the application and implementation of the provision in national practice.

5.2. Transposition, application, and interpretation of Article 24(2)

Many reports suggest that while there is no *specific* transposition of Article 24(2) into national law, the limitations on access to social assistance that the provision establishes can be identified across fragmented pockets of national rules.[133] We also found evidence of understandable (in our view) confusion, as national lawmakers and other national authorities try to grapple with both the implications and the outer parameters of the Court's case law.

5.2.1. First three months of residence (and beyond)

Reports that address the first three months of residence normally do so to confirm that any entitlement to social assistance for Union citizens is excluded.[134] However, some States provide for temporary assistance during this time period if exceptional circumstances materialise – e.g. 'if their living circumstances so require' (report for Croatia); 'anyone in need of urgent support' (report for Finland). These examples provide another illustration of the *reasonable* burden that a *certain degree of financial solidarity* could be said to require.[135] In the same context, but sending a rather different message, the report for Denmark notes that national law provides 'financial help to get back home' for short-term residents and jobseekers.

Another example discussed in the report for Denmark provides an apt illustration of disconnect in Union citizenship law between residence rights

133. See e.g. the reports for Bulgaria, Croatia, Denmark, Estonia, and the UK.
134. See e.g. the reports for Denmark, and France. Some reports do distinguish between an exclusion of entitlement for citizens who are not economically active and confirmation of entitlement for workers or the self-employed (see e.g. the report for Germany).
135. See again, *Grzelczyk*, para. 44.

and self-sufficiency, on the one hand, and support in exceptional circumstances, on the other. The issue concerns access to shelter homes for homeless persons who are nationals of other Member States. The report establishes that, according to Danish law, shelter homes 'which are to some extent State-funded shall only accept persons who are legally residing in the country' – a status that has been 'interpreted restrictively as excluding undocumented citizens (i.e. those who do not have a registration certificate, a residence card or a Danish health card)'. But the report points out that, first, Member State nationals have an unconditional right to reside in Denmark for three months (or longer if seeking employment) without a registration document; and, second, that registration documents are not, in any event, *constitutive* of the residence rights conferred by EU law. The limitations on access to State-funded shelter would appear to be justifiable, however, in light of Article 24(2) regarding the first three months of residence (or longer for jobseekers, recalling that *Vatsouras and Kouptantze* privileges benefits that 'facilitate access to the labour market' only) and in light of the Article 7(1) self-sufficiency requirement for residence longer than three months. But a technically lawful outcome does not always sit well with broader commitments to dignity and solidarity that underpin the Directive and the *idea* of Union citizenship.

The significance of lawful residence appears in the report for Estonia in a different way, noting that access to social benefits is granted to 'Union citizens and their family members *who have the right of residence* in Estonia' (emphasis in original). That right is, in turn, linked to registration of the place of residence. Significantly, the author notes that while there is 'no requirement to register a place of residence during the first three months of a person's stay in Estonia, there is nothing to prevent a Union citizen from doing so. Consequently, there do not seem to be any exceptions that would specifically limit access to social assistance' during that period.

A similar framework – emphasising residence registration – is outlined in the report for Hungary. Interestingly, the report notes that the obligation *not* to become an unreasonable burden applies to 'all groups' i.e. including the economically active. Linking back to the discussion in Section 2.3 above, it is also noted that recourse to social benefits for more than three months must be reported to the immigration authorities, who then 'decide on a case by case basis whether the person has sufficient resources in order not to become an unreasonable burden on the social assistance system of Hungary'. But it is also reported that 'in practice not a single case has ever been reported in which the right to [free movement] was withheld because of lack of financial resources and recourse to the social protection system'.

5.2.2. A special position for jobseekers?

Few reports outline a clear distinction in national law between access to social assistance generally and access to jobseeker's allowance specifically.[136] This does not necessarily mean that jobseekers are treated less favourably than the case law requires.[137] However, that outcome[138] or the risk of such an outcome[139] is explicitly alluded to in some reports.

The situation is more tangled in most States. For example, the report for Germany distinguishes between jobseekers qua EU law and persons who do not meet those criteria – e.g. persons who are not looking for a job, such as pensioners, persons with illnesses, or parents focusing on childcare; or persons who do not meet the *Antonissen* criteria because of absence of genuine willingness to commence work or sustained failure to secure employment because of lack of skills – but may still be eligible for certain social benefits if they are in a position to work as a matter of principle. In the report for the Netherlands, it is stated that '[n]ational law does not distinguish between the categories specified in Article 24(2) and jobseekers. Just like the categories specified in [that provision], job seekers do not have a right to receive social benefits'. However, it is also confirmed there that 'the 'real link' test is still used as an additional test, in order to verify whether there are grounds on which a right to social benefits ... may not be denied to an EU citizen under Article 18 TFEU' – and alongside national decisions on maintenance aid for studies, case law applying the test to the situation of (inter alia) jobseekers is also referenced.

In contrast, in the report for Germany, it is observed that domestic courts have mostly ignored the EU law requirement that applicants must demonstrate a real link with the German labour market. Rather, the question that is outlined in detail in the report concerns a hangover from *Vatsouras and Koupatantze* i.e. whether or not the Court intended to draw a distinction between the entitlement of jobseekers to benefits *specifically* aimed at 'facilitating ac-

136. But see e.g. the report for Cyprus (however, a more nuanced position emerges from the discussion of national *practices*). See also, the reports for Ireland, and Sweden (which also references case law on the scope of the status of jobseeker); and the report for the UK, noting the consequential implications outlined vis-à-vis access to other social benefits.
137. See e.g. the discussion in the report for Finland.
138. See e.g. the report for Italy: 'jobseekers do not enjoy the right to social assistance and are equated to EU citizens during the first three months of residence'.
139. See e.g. the report for Greece.

cess to the labour market' – clearly outwith the scope of the derogation in Article 24(2) – and their entitlement to *more general subsistence benefits*. In that context, the report traces the background in national case law to a preliminary reference seeking clarification of this point that is currently pending before the Court of Justice.[140] It is noted in the report for Denmark that first-time jobseekers are excluded from 'entitlement to a non-contributory benefit ensuring a minimum means of subsistence' – a restriction that the rapporteur queries in light of the Court of Justice's case law as 'this benefit can be *assimilated to a jobseeker allowance* since it is conditional upon the person being available to work and actively looking for employment' (emphasis added).[141] These contrasting examples underscore the need for clear guidance from Luxembourg.

5.2.3. Access to maintenance aid for studies

In a minority of States, Union citizens have full access to maintenance aid for studies either without any apparent restrictions[142] or subject to conditions lower than the five-year threshold in Article 24(2).[143] In most reports, however, the exclusion permitted by Article 24(2) has been transposed into national rules.[144] The converse of this position could be expressed, more positively, as *confirming entitlement* to study grants for workers, self-employed persons, persons who retain such status and members of their families, as well as for permanently resident Union citizens.[145]

However, even where formal rules specify a five-year rule, the requirement to evaluate the degree to which applicants for study grants can demonstrate a genuine link to the society of the host State appears to be recognised *in parallel* in some States[146] – interestingly, the report for France suggests a more successful embedding of this test with respect to students than is the case for jobseekers.

But we can also find examples of unduly restrictive practices. For example, linking back to the decision of the Court of Justice in *LN* – in which it

140. Case C-333/13 *Dano*, pending; [2013] OJ C226/9.
141. See relatedly, the decision in Case C-367/11 *Prete*, judgment of 25 October 2012.
142. See e.g. the report for Bulgaria.
143. See e.g. the reports for Hungary, and the UK.
144. See e.g. the reports for Denmark, and Germany.
145. See e.g. the report for Finland.
146. See e.g. the report for Sweden – in this case, however, the 'real link' test originates from national rather than EU law; see also, the report for the UK.

was confirmed that even '[t]he fact that the person entered the territory of the host Member State with the principal intention of pursuing a course of study is not relevant for determining whether he is a "worker" within the meaning of Article 45 TFEU' (para. 51) – the ability to apply for study loans in Estonia is nevertheless restricted to Union citizens (and their family members) who have acquired a right to permanent residence, 'regardless of whether the Union citizens simultaneously fall under the category or worker, self-employed person or someone who has retained such status'.

5.3. Question 5 – emerging issues and themes

The transposition, application, and interpretation of Article 24(2) exemplifies the **acute and persistent tension in Union citizenship law** between *limits expressly placed on movement and residence rights by legislation*, on the one hand, and an ambition to *give meaningful effect to the rights conferred by the Treaty through case law*, on the other.

The significance of the shaping of the Directive by the Court of Justice cannot be overstated. That judicial work guides the realisation of Union citizenship rights and also the national practices that deliver those rights in reality. But **the functions and purposes of interpretation can become frustrated when case law becomes unduly complex**, potentially *endangering* rather than *supporting* the implementation of rights.

Another facet of the relationship between codification and interpretation concerns the **mechanisms and priorities of enforcement**. Broadly speaking, the wording of Article 24(2) is, when transposed at all, transposed correctly. However, when national measures or practices are measured against the penumbra of related case law, a different reading of compliance with EU law materialises. How should these dynamics be managed?

Question 6

Please describe how the national courts and tribunals have understood, applied and differentiated between the concepts of 'public policy, public security or public health' (Article 27), 'serious grounds of public policy or public security' and 'imperative grounds of public security' (Article 28). How has the principle of proportionality been understood and applied in these contexts? How have the national courts and tribunals taken account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation,

social and cultural integration into the host Member State and the extent of his/her links with the country of origin?

Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27: General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

...

Article 28: Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

6.1. Introduction

Chapter IV of Directive 2004/38 establishes the framework within which Member States may 'restrict the freedom of movement and residence of Union citizens and their family members' i.e. on grounds of public policy (better captured by the French term, *ordre public*), public security, or public health (Article 27). Additionally, Article 28 confirms that States may take an expulsion decision against Union citizens or their family members on the same (or versions of the same) grounds.[147]

These provisions provide an excellent example of judicial/legislative synergy, since several of the phrases and tests now codified in the Directive come from classic (and now repealed) legislative measures as interpreted by the case law. In particular, Article 3(1) of Directive 64/221 had provided that '[m]easures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned'. This phrase is restated in Article 27(2) of Directive 2004/38, but it is followed by the explanation that, first, such conduct 'must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' and, second, conversely, measures relying on 'considerations of general prevention shall not be accepted' – principles developed by the Court.[148]

The discretion accorded to Member States in this context is further curtailed by more general interpretive principles. First, the basic convention that free movement rights must be interpreted broadly whereas derogations must be construed strictly is obviously relevant here.[149] The implications of this approach were explained in *Jipa*:

147. Article 29(1) outlines the scope of public health in this context: 'diseases with epidemic potential as defined by ... the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State'. It is important also to note the protection contained in Article 29(2): '[d]iseases occurring after a three-month period from the date of arrival shall not constitute ground for expulsion from the territory'. Given the limited parameters of Article 29, we did not pursue its application further through the questionnaire. For an example provided in the area of public health, see the report for Cyprus on *OFU v Republic*, Case Number 857/2010, judgment of 24 April 2013.
148. See e.g. Case 30/77 *Bouchereau* [1977] ECR 1999, para. 35; Case 67/74 *Bonsignore* [1975] ECR 297, para. 7.
149. See e.g. Case 41/74 *Van Duyn* [1974] ECR 1337, para. 18; Case 36/75 *Rutili* [1975] ECR 1219, paras 26-27.

> [W]hile Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the [Union] context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the [Union] institutions.[150]

The finding was amplified even further by citizenship: 'a *particularly restrictive* interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union' (para. 41, emphasis added). After all, as the Court has frequently asserted, Union citizenship is 'destined to be the fundamental status of nationals of the Member States'.[151]

Second, the importance of taking any restriction or expulsion decisions in line with the requirements of proportionality is reinforced both by the general reference to the principle in Article 27(2) and in the more specific instructions about consideration of individual circumstances detailed in Article 28(1) – a template for which the origins can, once again, be traced in the case law.[152]

It is also important to emphasise the statement in Article 27(2) that '[p]revious criminal convictions shall not in themselves constitute grounds for the taking of such measures'. In *Orfanopoulos and Oliveri*, the Court interpreted this limit (which comes from Article 3(2) of Directive 64/221) as part of the general scheme of public policy:

> While it is true that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, *the public policy exception must, however, be interpreted restrictively*, with the result that the existence of a *previous* criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are *evidence of personal conduct constituting a present threat* to the requirements of public policy ...[153]

The Court thus held that national systems where an expulsion measure 'automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person repre-

150. Case C-33/07 *Jipa* [2008] ECR I-5157, para. 23.
151. Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 65.
152. See e.g. *Orfanopoulos and Oliveri*, paras 95-99.
153. *Orfanopoulos and Oliveri*, para. 67 (emphasis added), citing Case C-348/96 *Calfa* [1999] ECR I-11, paras 22-24.

sents for the requirements of public policy' are contrary to EU law.[154] More specifically, national authorities must remember that 'the previous criminal conviction of the person concerned *is not by itself sufficient* to permit the view to be taken, *automatically*, that he represents a genuine, present and *sufficiently serious threat to one of the fundamental interests of society*, that being *the sole possible justification* for a restriction on the rights conferred on him by European Union law'.[155]

Chapter IV also establishes relevant procedural safeguards.[156] First, while the Directive does not deal expressly with how Member States should frame exclusion orders in terms of *duration*, Article 32(1) provides that '[p]ersons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order ... by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion'. Second, and again reflecting the ruling in *Orfanopoulos and Oliveri,* Article 33(1) prohibits the issuing of expulsion orders 'as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29' of the Directive.

Finally, it is significant that Article 28 of the Directive introduces distinctions vis-à-vis the *level* of protection provided to *different categories of persons* for the first time. According to Article 28(2), Union citizens (or their family members) who have the right of permanent residence may only be expelled from the host State on 'serious' grounds of public policy or public security. Article 28(3) then establishes that only decisions based on 'imperative grounds of public security' may be taken against Union citizens who have resided in the host State for the previous ten years, or are minors (unless the expulsion is necessary for their best interests). The Court interpreted the scope of 'imperative grounds of public security' in *Tsakouridis*:

> It follows from the wording and scheme of Article 28 ... that by subjecting all expulsion measures in the cases referred to in Article 28(3) ... to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature *clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances'*, as set out in recital 24 in the preamble to that directive. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such

154. *Orfanopoulos and Oliveri*, para. 68.
155. Case C-430/10 *Gaydarov* [2011] ECR I-11637, para. 38 (emphasis added).
156. On which, see more generally, Case C-300/11 *ZZ*, judgment of 4 June 2013.

a threat is *of a particularly high degree of seriousness* ... As regards public security, the Court has held that this covers both a Member State's internal and its external security ... The Court has also held that a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security ...[157]

The Court held that 'objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group' could fall within that definition.[158] However, its framing of the test in *PI* around conduct 'constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of "imperative grounds of public security"' has been criticised.[159]

Finally, and mirroring the discussion in Section 4.1 above, the Court has also held that 'periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) ... and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision'.[160]

Being permitted to enter and/or remain in a host State is the very crux of free movement – these are the gateway points to most of the other rights conferred by the Treaties and by relevant legislation. In consequence, the framework established by the Directive, read in light of the case law interpreting the relevant principles and tests, sets a deliberately high threshold of protection for Union citizens and their family members against restrictions of their free movement rights, up to and including expulsion measures. But it is, of course, a palpable intrusion into and adjustment of the national immigration sovereignty otherwise practised by States.[161]

In this part of the questionnaire, we sought to examine the extent to which the high standards intended by EU law are applied by national authorities *in*

157. Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paras 40-44 (emphasis added).
158. *Tsakouridis*, para. 45.
159. Case C-348/09 *PI*, judgment of 22 May 2012, para. 28; for comment, see D. Kochenov and B. Pirker, 'Deporting citizens within the European Union: a counter-intuitive trend in Case C-348/09 *PI v Oberbürgermeisterin der Stadt Remscheid'* (2013) *Columbia Journal of European Law* 369.
160. Case C-400/12 *MG*, judgment of 16 January 2014, para. 33.
161. A statement from the Supreme Court of Cyprus noted in that report captures this point well: 'the deportation order, especially in cases where public order is affected, does not have a punitive character but is rather an expression of state sovereignty' (*Krisztian Bekefi v Republic*, Case Number 293/2012, judgment of 7 March 2012).

practice. It can be noted from the outset that, regrettably, the gap between the articulation of citizenship law in principle and the application of citizenship law in practice is perhaps wider here than we found for any other part of the questionnaire.

6.2. Restrictions on free movement law: the gap(s) between principle and practice

The national reports provided extensive responses to Q6, which are summarised here as follows. First, we tend to think about public policy or public security primarily in connection with expulsion measures, but it is important to recognise that States restrict free movement rights at the points of *entry to* or *exit from* their territories too (Section 6.2.1). We then present the data relevant to expulsion measures (Section 6.2.2), aiming to compare the threshold applied in practice with the framework communicated by the Directive. Three issues are outlined in more detail – bans on re-entry; where abuse of rights concerns fit in the restriction framework; and whether or not the three levels of protection indicated by Articles 27 and 28 are materialising in practice. The application of proportionality/consideration of individual circumstances is examined separately in Section 6.3.

6.2.1. Restrictions on entry to and exit from Member States

The standards that we normally think about in the context of expulsion apply to restrictions on movement and residence more generally too, as confirmed by the general 'restriction' language in Article 27(1) and (2) of the Directive in particular. The language used in several national reports conveys this point clearly too.[162] For example, in the report for Estonia, the quashing by the court of appeal of a ban on entry addressed to a Finnish citizen is connected to the prohibition of measures taken on 'considerations of general prevention' in Article 27(2) of the Directive.

This unified approach contrasts with the distinction drawn between refusing entry and requiring deportation in the report for Finland, where it is noted that:

> [T]he threshold for the former is *far lower than for the latter*. In practice, EU citizens, their family members or other relatives have been refused entry *on the basis of fairly minor of-*

162. See e.g. the report for Denmark.

fences. According to the information obtained from the Finnish Immigration Service, *even the suspicion* of having committed an offence has led to refusing entry into Finland. Repetitive petty theft and shoplifting, drug offences (other than for minor self-use) and multiple cases of driving while seriously intoxicated have, also led to the refusal of entry. Such criminal behaviour and the refusal of entry related thereto are justified under 'public order and security' [emphasis added].

The practices outlined above are explained as applying more specifically to 'EU citizens whose residence has not been registered and their family members or other relatives who have not been issued with a residence card'. Even so, however, while such decisions may be limited to that specific context and be based on the personal conduct of the individual concerned, they appear to take little account of either the proportionality or 'genuine, present and sufficiently serious threat to one of the fundamental interest of society' tests that must pervade *all* national measures taken on grounds of public policy or public security according to Article 27(1).[163]

In the report for Greece, reference is made to a case in which a Polish national was 'denied a registration certificate on the sole ground that she had been recently convicted to a minor sentence for insulting a police officer' – here, the Council of State overturned that decision. However, the Council of State upheld a similar decision taken in 2008 'on the sole ground that [the applicant, a Romanian national] had been convicted for committing a series of burglaries over a long period of time and for illegally entering Greece' – but the convictions dated 'back from 1998-2002', raising doubts about the extent to which the applicant was really a *present* threat.

Restricting the right to leave a Member State is discussed in detail in the report for Bulgaria, outlining cases challenging the legality under EU law of restrictions placed on Bulgarian citizens because of the commission of a criminal offence while residing in another State, or having a tax, social security, or private debt of more than approx. €2500. In a related preliminary ruling, the Court of Justice held that 'the right of free movement of Union citizens is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect'.[164] Article 4 of the Directive, which articulates the right of exit, does not acknowledge the permissibility of national restrictions on that right. However, the Court noted that relevant 'limitations and conditions stem, in partic-

163. Cf. the report for Slovenia, noting consideration of these grounds by courts reviewing decisions denying temporary residence permits for family members.

164. *Gayadarov*, para. 39.

ular, from Article 27(1) of Directive 2004/38',[165] going on to emphasise the general principles that should guide the application of that provision as well as the right to effective judicial review of related national decisions. The discussion in the national report also provides a useful illustration of cases where national, EU, and ECHR law overlap, yet lead to different outcomes in substance.

6.2.2. Deporting Union citizens and their family members: is the framework of the Directive being applied in practice?

It should first be noted that in some of the national reports, a finding that national practice is closely aligned to the case law of the Court of Justice is clearly presented.[166] Additionally, even where more problematic aspects of national case law are discussed below, it should be pointed out that there are also examples of case law – including in the same States – where compliance with EU legal standards is clear.[167] However, there are multiple examples in the national reports that illustrate a profoundly problematic understanding and/or application of the EU legal framework on expulsion. Most expulsion decisions are taken in connection with criminal convictions,[168] and reports point to difficulties in connection with demonstrating a *present* threat on the basis of *past* convictions;[169] as well as the question of managing *cumulative* convictions.[170]

On the first point, we did find evidence of efforts to establish patterns of behaviour that would fit with the 'genuine, present and sufficiently serious threat' test in Article 27(2) of the Directive, as well as its statement that pre-

165. *Gayadarov*, para. 30; on the legality of debt-linked restrictions, see Case C-434/10 *Aladzhov* [2011] ECR I-11659 (public debt) and Case C-249/11 *Byankov*, judgment of 4 October 2012 (private debt).
166. See e.g. the report for Austria, where the Court's interpretation of public security, in particular, is clearly traced within national case law.
167. See e.g. the text in the report for Denmark linked to notes 49-52.
168. See statements to the same effect in e.g. the reports for France, Germany, and the UK.
169. See e.g. decisions of the Regional Administrative Court in Warsaw on this point outlined in the report for Poland.
170. See e.g. the report for Sweden.

vious criminal convictions shall not *in themselves* constitute grounds for expulsion.[171] In the report for the UK, for example, it was noted that:

> The risk of re-offending is often central to the question of whether the appellant poses a *present* threat and to whether deportation is proportionate. Following *Tsakouridis*, this risk is increasingly assessed by reference to the potential impact of deportation on the rehabilitation and social integration of the EU citizen/family member concerned. The 'European' dimension to this question is acknowledged. Thus, the Court of Appeal has stated that 'common sense would suggest a degree of shared interest between the EEA countries in helping progress towards a better form of life'.[172]

More typically, however, we find evidence of what could be described as 'expulsion reflex'. Also in the report for the UK, for example, the authors acknowledge that 'national courts consistently take into account factors such as the applicant's social, familial and cultural links in the UK and compare them with, for instance, the individual's knowledge of the language of his/her Member State of origin, and the availability (or not) of familial and financial support in that State'. However, they also provide 'examples of a potentially tokenistic consideration of these questions resulting from a possible tendency by the national courts to overlook personal circumstances or use a one size fits all approach to personal wealth'.

Examples of cases where the expectations set by EU law made scant impact also include the discussion in the report for Cyprus of the *Vorel* case – where a deportation order was issued following the Romanian applicant's arrest even though he had 'no criminal record; had no prior conviction and no criminal proceedings were pending against him'.[173] In the report for Denmark, the expulsion and exclusion for five years of two Polish nationals 'convicted of stealing in a supermarket and sentenced to 60 days [in] prison' is noted – with the Supreme Court confirming that the offences committed 'were a serious threat to the public order and security'.[174]

171. See e.g. the text in the report for Denmark linked to notes 53 and 56-58; linking questions about 'whether there is a tangible risk of repetition of criminal offences' to proportionality assessments, see the report for Germany.
172. Report for the UK (emphasis in original), citing *Flaneur's Application for Judicial Review, Re* [2011] NICA 72.
173. *Anghel Vorel v Republic*, Case Number 1064/2012, judgment of 2 August 2012; the order preventing the applicant from re-entering Cyprus was subsequently suspended by the Supreme Court.
174. Judgment of the Supreme Court of 19 October 2009 in case 425/2008, reported in U.2010.250H.

In the majority of cases, courts – and mainly higher courts[175] – have overturned unsubstantiated (from the EU law perspective) expulsion decisions taken by administrative authorities. But how many applicants do *not* challenge an expulsion measure; and of those who do, how many *persist* through the appellate chain?

On the second point, about cumulative offences, the report for the Netherlands highlights a ministerial statement from 2011 that 'the accumulation of offences (that individually would not reach the threshold of constituting a threat to a fundamental interest of society) could together be considered to meet that threshold'. Interestingly, it is observed that the Commission 'did not raise any objections to this new approach, whereas the judiciary has been careful to check whether the behaviour of the individual concerned still constitutes a genuine and sufficiently serious threat to a fundamental interest of society'. The report cites the decision of the Court of Justice in *Polat* on this point, which reaffirms that an expulsion measure is justified only if the relevant 'personal conduct indicates a specific risk of *new and serious* prejudice to the requirements of public policy'.[176]

The report for Denmark outlines a starkly formalistic approach to the connection between criminal convictions and expulsion that the rapporteur describes as being 'contrary to the Directive' i.e. rules specifying *type*s of offences that can justify expulsion are included in the national transposition measure – a system that plainly contravenes several of the principles set out in Articles 27 and 28, and is discussed further in Section 6.2.4 with respect to its transgression of the different *levels* of protection expected under Articles 27, 28(2) and 28(3).

Finally, the discussion in Section 2.2 above should also be recalled, on the point that 'the rationales underpinning deportation decisions can be blurred together'. There, we cited examples of expulsion decisions taken ostensibly on grounds of protecting the public order for minor offences that, according to the report for Denmark, are 'are inherently linked to economic considerations' (Q2). In the report for Cyrpus, it is noted similarly that cases involving restrictions on free movement rights have clustered around three issues – reverse discrimination, marriages of convenience, and the non-recognition of

175. For a rare example of a higher court taking a *narrower* view on appeal, see the report for Sweden's discussion of MIG 2009:21; the rapporteurs point out that the narrowness of the decision also runs counter to the general approach of the appellate criminal courts.

176. Case C-349/06 *Polat* [2007] ECR I-8167, para. 35 (emphasis added).

registered partnerships – rather than being linked directly to Articles 27-33 of the Directive.

Overall, therefore, it would seem that the idea of *stability* of residence – a concept that surely befits an area without frontiers with its own citizenship status – is being severely impinged on several fronts by national practices on expulsion and exclusion.

6.2.3. Bans on re-entry

The permitted duration of an expulsion order – of, in other words, a ban on re-entering the State in question – is not something that has arisen frequently in the case law of the Court of Justice aside from the point noted in Section 6.1 above: that EU free movement law precludes national legislation in which expulsion from the State automatically follow a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy; the duration of the expulsion order is also subject to proportionality review in a more general sense.[177]

We were struck, however, by the frequency with which bans on re-entry were discussed in the national reports – an obvious yet perhaps under-explored facet of the legitimacy of national expulsion orders: no doubt because EU lawyers tend to focus mainly on 'central' sources of EU law. Unsurprisingly, the question of exclusion orders was almost always raised in connection with expulsion decisions linked to criminal convictions, and examples of the kinds of bans imposed are included across several parts of this Section (e.g. from the report for Denmark, a ban on re-entry for six years for the use of false identity documents that constituted the basis of a claim for residence and a right to work, outlined further in Section 6.2.5 below).

6.2.4. Articles 27 and 28: three levels of protection?

Generally, national transposition measures are reported to effect the distinctions set out in Articles 27 and 28 of the Directive.[178] We also found particular awareness of the specific gravity of imperative grounds of public security, often in connection with the trafficking of narcotics and closely reflecting the

177. See again, *Orfanopoulos and Oliveri*, para. 67, citing *Calfa*, paras 22-24.

178. Cf. however, the report for Estonia, where it is noted that the concepts are not clearly distinguished.

reasoning of the Court in *Tsakouridis* in this respect.[179] In the report for Bulgaria, it is noted that the requirement of 'serious' grounds of public policy or public security for cases involving citizens who have acquired the right of permanent residence seems to have been transposed also for citizens who have resided there for less than five years – providing an example of more national favourable treatment than EU law requires. There are also, however, some notable instances of transposition transgression.

Recalling the approach to criminal convictions operating in Danish law, introduced in Section 6.2.1 above, the illustrations noted in that report show that the relevant national rules link the expulsion of a foreigner who has lived for more than nine years in Denmark to offences punishable by more than three years in prison – since most of these cases will in fact involve residence for more than ten years, can we really say that this is a correct understanding of 'imperative grounds of public security' in accordance with Article 28(3)? When a foreigner has lived there for between five and nine years, offences that are punishable by just one year in prison will be sufficient – again, very unlikely to align with *serious* grounds of public policy or public security within the meaning of Article 28(2). And it is perhaps even more striking that in all other cases – which necessarily involves situations where Union citizens or their family members have not yet acquired permanent residence in Denmark – 'offences which are punished by a prison sentence are sufficient, or where the person *otherwise* constitutes a threat to the public order, security or health' (emphasis added). This sentence-driven system skirts close to a *presumption* of expulsion: something that is, as we have seen, consistently censured by the Court of Justice in its case law.[180]

In the same report, a problematic decision of the Appeal Court from 2008 is also outlined.[181] In that case, a Slovakian national who had resided in Denmark for more than ten years had been sentenced to four years and six months in prison for offences that included theft and violence against persons. The Appeal Court 'considered that he should be expelled for life relying essentially on the serious nature of the committed offences' alongside the fact that he had previously been sentenced to five years in prison 'for similar of-

179. See e.g. the reports for Finland, and the Netherlands.

180. For another example of a system that links the application of the Directive's concepts to the gravity of the offences committed rather than to a timeline of residence per se, see the report for France; but note also, the emphasis placed on proportionality and individual circumstances in the same report. See further, the report for Italy.

181. Judgment of the Western Appeal Court of 13 November 2008, S-1421/08, reported in U.2009.581V.

fences'. However, '[i]t was not disputed that he had strong links to Denmark, had three sisters living there and spoke the language. In contrast he had no link to Slovakia and could barely speak th[at] language'.

Ironically, the Appeal Court counted his previous term in prison as lawful residence – something that is not required by EU law, we learned subsequently, according to the decision of the Court of Justice in *MG*. However, following its more generous reasoning on that point, and while the situation was addressed by the Appeal Court under Article 28(3)(a) of the Directive – *imperative* grounds of public *security* – it concluded that the seriousness of the offences committed met that threshold, a finding patently at odds with the reasoning in *Tsakouridis* and *PI*, as outlined in Section 6.1 above (and with the reasoning applied later by the Danish Supreme Court in a 2012 case on the same provision that is also outlined in the report). The fact that the order mandated expulsion *for life* added another layer of *dis*-proportionality.

The report for the UK provides comprehensive discussion of the prevalence in national case law of questions connected to the calculation of periods of residence, which in turn determines the level of expulsion protection that should be applied. However, the intensity of that case law is premised on another point made in the report: '[a]t the administrative level, a lack of consistency as to whether a person will be considered to have resided in the UK for [the] past ten years, despite a period of imprisonment prior to the deportation order, has led to a "luck of the draw" application of [Article 28(3)(a)] protection'. The Court of Justice does, as noted above, exclude periods of imprisonment. But the theme of administrative inconsistency redressed through the process of judicial review is, by now, a familiar one.

The report for the UK also states that national courts have 'openly questioned whether administrative guidance adequately distinguishes between different levels of protection, especially in light of the case law of the Court of Justice. As a result, differentiation based on "severity" of the conduct or custodial sentence length alone has been rejected'. Nonetheless, the Report goes on to outline a series of offences that have been held to constitute 'serious' or 'imperative' grounds in *both* administrative guidance and national case law.[182]

182. See the text in the report for the UK linked to notes 132-147.

6.2.5. Abuse of rights

The national reports highlight an important question that has not yet been addressed definitively by the Court of Justice: do situations of abuse of free movement rights preclude the application of free movement law altogether, or are the underlying issues better considered when restrictions placed on those rights are being evaluated at the stage of State justification arguments? Article 35 of the Directive appears to leave room for the operation of both approaches:

> Member States may adopt the necessary measures to *refuse, terminate or withdraw* any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31 [emphasis added].

In a memo published on 15 January 2014, the Commission outlines a *dual* expulsion/exclusion approach:

> National authorities may investigate individual cases where they have a well-founded suspicion of abuse and, if they conclude that there is indeed an instance of abuse, they *may withdraw the person's right of residence and expel him/her from the territory*.
>
> *In addition*, after assessing all relevant circumstances and depending on the gravity of the offence (for instance, forgery of a document, marriage of convenience with involvement of organised crime), *national authorities may also conclude that the person represents a genuine, continuous and sufficiently serious threat to public order* and, on this basis, also issue an exclusion order in addition to expelling him/her – *thus prohibiting his/her re-entry into the territory for a certain period of time*.[183]

Through this method, the Directive's requirements on public policy become relevant only if a Member State intends to attach an *exclusion* order to an *expulsion* measure – with the latter being justifiable solely on the basis that a finding of abuse has been made. Does national practice reflect or differ from the Commission's proposed framework? And does it shed any light on the merits, or otherwise, of that approach?

---

183. 'European Commission upholds free movement of people' (emphasis added), available at http://europa.eu/rapid/press-release_MEMO-14-9_en.htm. The Commission also stated that it will 'will help national authorities implement EU rules which allow them to fight potential abuses of the right to free movement by preparing a Handbook on addressing marriages of convenience by spring 2014'; that publication remains forthcoming at the time of writing.

There are signs that national authorities *do* separate out the application of Articles 27/28 and Article 35 in certain respects. But the consequences of doing so can differ significantly. In the report for the Czech Republic, for example, reference is made to a decision of the supreme administrative court in which it was confirmed that 'illegal stay or entry to the Czech Republic' could not of itself constitute a genuine, present and sufficiently serious threat to public order, with the court making particular reference to protecting family members in this respect. The report also notes that the court distinguished between the expulsion system set out in Articles 27-33 of the Directive and the notion of 'abusing rights or deception' laid down in Article 35, using the examples of fictitious marriages and fictitious declarations of paternity to illustrate the latter concept.

Interestingly, however, precisely because 'fictitious marriage could [not] be subsumed under the concept of "public order"', the court concluded that an expulsion decision made on that basis could not be considered to be a 'proportionate intervention'. The national court thus extended more protection to the individuals concerned than would seem to be required by a literal reading of Article 35 of the Directive – which makes reference only to the procedural safeguards specified in Articles 30 and 31, and recalling that the proportionality and individual circumstances review requirements of Articles 27 and 28 refer to expulsion decisions based on public policy, public security or public health only. This national interpretation thus illustrates a lacuna in the Commission's proposed approach, when read against the scheme and general principles of the Directive as a whole.

The view of the national court in the Czech Republic contrasts with cases outlined in the report for Denmark, where – linking also to the proportionality requirements considered in Section 6.3 below – the author comments that in cases where it is found that a Union citizen's family member is residing illegally there, 'it seems very difficult to prove that deportation ... is disproportionate, the argument being that the link to Denmark has been established illegally'. The cases discussed concern the use of false identity cards 'in order to manufacture a right of residence and work'. The Danish Supreme Court has ruled that such activities – as well as the practice of illegal residence and work – '*make the person* a genuine, present and sufficiently serious threat to one of the fundamental interests of society pursuant to the Directive which can justify expulsion for six years'.'

The fact that the applicant (an Iraqi national) had a child with a national of another State residing in Denmark and that the couple was expecting a second

child at the time 'did not alter this finding'.[184] The Supreme Court's approach thus conflated the application of Article 35, on the one hand, with the tests set out in Articles 27 and 28, on the other – but without actually seeking to *apply* the principles and protections that frame the latter set of provisions. It is especially remarkable that the prison sentence that had been imposed in this case was just 60 days.

6.3. Proportionality and individual circumstances

The relevance – or, regrettably, otherwise – of proportionality has already been mentioned in several parts of Section 6.2, but it is worth drawing attention to this dimension of the expulsion system more specifically too. There is, once again, a clear division in the national reports on this aspect of Q6.

It is clear that national authorities in some States carefully *apply* the principles of the Directive in this respect – described, for example, as 'a fundamental part of the [expulsion] decision' in the report for Austria.[185] In the report for the Netherlands, it is pointed out that the burden of proof for proportionality considerations lies with the individual challenging an expulsion decision: '[i]f no elements linking the individual to Dutch society are brought forward, or if the individual explicitly stated that there is no reason for staying in the Netherlands, national courts generally accept that the principle of proportionality was respected. When elements are brought forward individuals must provide sufficient evidence to support the claim'.

Respect for family life is the interest specified most often with respect to consideration of individual circumstances.[186] Some reports suggest, however, that *strong* links to the State or to family members residing there will be nec-

184. This part of the case is also discussed in the report for Denmark under Q1; judgment of the Supreme Court of 24 August 2012 in case 58/2012, reported in U.2012.3399H.

185. See further, the discussion of proportionality vis-à-vis national case law and the practices of national administrative authorities in the report for Portugal. See also, the reports for Finland ('the court's reasoning emphasises proportionality'), and Greece.

186. See e.g. the reports for Austria, Cyprus (where it is noted, however, that consideration of this right is 'almost exclusively done in relation to Article 8 ECHR, and not (yet) the EU Charter of Fundamental Rights, at least in a manner that has a practical effect for the outcome of the review'), Finland ('[e]mphasis is placed on the best interests of the child as well as the protection of family life'), France, and Italy (where it is again pointed out that Article 8 ECHR remains, for now at least, the key touchstone in this respect).

essary in order to overturn an expulsion decision on that basis.[187] In the report for the Netherlands, for example, a list of considerations that have *not* been accepted as sufficient to displace expulsion decisions include 'having a relationship with a person living in the Netherlands'; 'good behaviour in prison'; 'birth of a child/back on the right path'; and 'economic situation in country of origin'.

However, we found several examples on the basis of which it could be claimed that national authorities might *recite* the principles codified in the Directive but that does not necessarily mean that they apply them in line with EU legal standards in reality. Interestingly, the report for Cyprus draws a distinction between the application of proportionality by the Supreme Court when reviewing administrative decisions generally ('applied vigorously') and reviewing expulsion decisions where, in contrast, 'the application of the test seems to be deferential to the discretion of the decision-making body'.[188]

In a case outlined in the report for Denmark – based on Article 28(3)(a) i.e. legal residence exceeding ten years – it was noted that '[t]he convicted person's personal situation and his link to Denmark could not outweigh the seriousness of the criminality committed. This was despite the fact that it was not disputed that he grew up in Denmark where his family was living, that he had no link to Croatia and could only speak Roma besides Danish'. And what were the *imperative* grounds of public *security* at issue? – A five-year sentence for robbery, in the light of previous conviction and imprisonment for similar offences.

6.4. Question 6 – emerging issues and themes

In the Institutional Report, post-Directive case law is characterised as follows: '[a]dmittedly, the Court of Justice was at pains to *qualify* most of the rules established in [its] judgments but one thing stands out from those rul-

187. See e.g. the report for Denmark ('[p]ersonal circumstance are unlikely to make the balance tip in another direction').

188. See e.g. the discussion on *Krisztian Bekefi v Republic*, Case Number 293/2012, judgment of 7 March 2012. The report points also, however, to the manner in which the Supreme Court resolves cases for the benefit of the individual by applying the principle of equal treatment, thus characterizing concerns about the approach to proportionality as 'of secondary value as long as the approach of the [Supreme] Court remains focused on safeguarding the intensity of review of the administrative actions in this field'.

ings – the Court of Justice was meticulously ensuring that it cannot be seen as an insurmountable obstacle to expulsion by interpreting the enhanced protection against expulsion as any sort of an *absolute prohibition*' (emphasis added). Even so, the evidence presented in national reports suggests that, in contrast to most of the preceding findings in this Report, **there is a systemic problem with the application of EU legal standards in the area of expulsion**.

EU law establishes a high threshold of protection against restrictions on free movement rights and against expulsion for *all* Union citizens who reside in other States. The relevant provisions of Directive 2004/38 are relatively detailed and have, on the whole, been properly transposed into national law. The extensive case law of the Court of Justice has explained and reinforced the principles that those provisions capture. And national courts have been notably willing to refer questions about the *new* thresholds created by the Directive. We saw, for example, that the decision in *Tsakouridis* has already left a clear imprint on national judicial consciousness.

However, **national practices consistently fall short of the *citizen-centric* framework established by EU law**. The national reports, taken together, evidence a troubling degree of disconnect from what *should* be happening if the EU legal framework were correctly applied – demonstrating powerfully that **transposition is just the first step towards building up the national implementation matrix**.

A particularly strong theme of **expulsion as punishment for criminal activity** emerges from the national reports. Linking back to the discussion on permanent residence in Section 4.1, we see further fleshing out of 'good' and 'bad' citizenship narratives. Who shapes that narrative, and on what basis? The Institutional Report raises a general question about **how the conservatism of the Member States feeds upwards to the Court of Justice**. To put it another way, without saying so directly, the Institutional Report is acknowledging that in many if not all States, the deportation of foreign national prisoners – whether EU citizens or third country nationals – is an issue of high political salience, representing one of the key tests that governments have to pass in order to be seen as effective in the area of immigration policy. But there is a dangerous line between appropriate and dynamic political pragmatism and mutual institutional engagement, on the one hand, and undue political influence, on the other. The challenges raised by expulsion are not easy to resolve. But, for now at least, the Member States have *chosen* to manage these challenges within a *rights*-based citizenship framework – not a privilege-focused immigration mindset that is shaped by *permissions*.

The Institutional Report states that '[t]he strong attachment of the Member States to the possibility of restricting free movement on the grounds of public policy or public security and the Court of Justice's willingness not to stand as an obstacle to this means that no absolute protection against expulsion is likely for the foreseeable future'. But it also emphasises that the '**procedural safeguards** of EU citizens that help them to fight arbitrary or incorrect decisions restricting their rights are being strengthened by the Court of Justice'. The procedural dimension of the Directive is critical. But it should not be seen as a substitute for appropriate decision-making in the first place. After all, **most individuals never seek judicial review** of 'arbitrary or incorrect decisions' in the first place.

In our view, **further legislation at EU level may be needed** – especially to elaborate on how to manage criminal convictions within the framework of expulsion. Legislation cannot account for every twist that will arise in national practice, but the breadth of the principles that we have at present – notwithstanding their interpretation over several decades by the Court of Justice – is just not working. This point also bridges well to Q7 and Q8, both of which address the application of principles of EU law at national level where there is no legislative underpinning of those principles in Directive 2004/38 at all.

EU citizenship *beyond* Directive 2004/38/EC – Exploring national application of primary EU law

Thinking especially of the decisions in *Rottmann* and *Ruiz Zambrano,*[189] it is clear that the adoption of Directive 2004/38 did not diminish the interpretative powers of the Court of Justice with respect to the primary citizenship rights conferred directly by the Treaties. Our questions here were constructed to elicit information about the extent to which national authorities are responding to that jurisprudence and are willing to go beyond the boundaries of the Directive in appropriate cases. We highlighted two key areas in this respect:

(1) **Purely internal situations** and the issue of reverse discrimination, especially in cases involving family reunification claims; and

189. Case C 135/08 *Rottmann* [2010] ECR I-1449; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

(2) The extent to which **national rules on the acquisition and loss of citizenship** accommodate, or otherwise, the specific implications of those rules for acquisition and/or loss of the status of Union citizenship.

Question 7

To what extent do national courts and tribunals tend to reject arguments based on EU citizenship rights on the grounds that the dispute involves a 'purely internal situation'? To what extent has the Court of Justice's case law grounded directly on the TFEU's citizenship provisions (e.g. *Chen*, *Ruiz Zambrano* and subsequent decisions) been effectively implemented and applied at the national level? Does the case law distinguish clearly between rights acquired under Directive 2004/38 and under Articles 20 and/or 21 TFEU when EU citizens are seeking family reunification rights from their home Member States? Have legislative or specific administrative changes been put in place? How are these matters being dealt with by the national courts?

7.1. Introduction

In Section 1.7, the complexity of EU citizenship law was illustrated by outlining the different categories of Member State nationals that come within the scope of either the Directive or the primary rights conferred by the Treaty. In this part of the questionnaire, the focus falls on two of those categories in particular: migrant Union citizens who have returned to their home States; and static Union citizens residing in their home States for whom EU legal protection applies in exceptional circumstances.

The scope of Directive 2004/38 is tied expressly to situations where a Member State national (1) exercises movement, and (2) is *in* a host State. Since the decision in *Singh*, however, we know that a shield of EU legal protection continues to attach to the migrant citizen – and by extension to his or her family members – when s/he returns to the home State. Responding to a question about whether a third country national spouse could claim residence rights after the couple had returned to the (formerly) migrant citizen's home State, the Court concluded:

> A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the

conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.[190]

The same reasoning was extended in *D'Hoop* to the refusal of a tideover allowance to a Belgian national on the grounds that she had completed her secondary education in another Member State. Again, within a broader context of effectiveness, the Court emphasised that 'it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement'.[191] As noted in Section 1 above, the Court has ruled in *O* that the conditions for lawful residence laid down in Directive 2004/38 also apply by analogy to claims for family reunification that an applicant makes once back in the home State – a ruling that was described as 'nervously awaited' in the report for Denmark.[192] In the same case, the Court also imposed, in effect, a *minimum duration* for the exercise of free movement rights that needs to be met before the protective EU shield can be generated, by aligning the idea of 'genuine residence' with residence established under Article 7(1) – and not Article 6(1) – of the Directive i.e. residence for more than three months.[193]

In *Chen*, the Court had confirmed that a minor Union citizen had a right under EU law to reside in a host Member State; and that the parent who was her primary carer derived residence rights there on the same basis. It was pointed out, however, that the child was 'covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State'.[194] Another point is also important to note from the decision – the child had acquired an Irish passport, in accordance

190. Case C-370/90 *Singh* [1992] ECR I-4265, paras 19-20.
191. Case C-224/98 *D'Hoop* [2002] ECR I-6191, para. 30.
192. Case C-456/12 *O*, judgment of 12 March 2014. The case stems from proceedings in the Netherlands, and is discussed in that report around the text in notes 60-63 and after the text at note 65. See also, the discussion of the cases outlined at notes 62-63 in the report for Denmark, and at notes 45-46 in the report for Germany.
193. *O*, esp. paras 52-53.
194. Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para. 47.

with Irish nationality law, by virtue of being born in Northern Ireland. The intention was always to live in the United Kingdom; crucially, the holding of an Irish passport was sufficient to trigger a sufficient connection to EU law, even in the absence of *physical* movement between the two States.

For static citizens, the general position was that EU law has no bearing on matters that are purely internal to one State, and that Union citizenship had not altered this limitation.[195] However, building on the ruling in *Rottmann* – considered separately under Q8 below – the Court created a revolutionary new test in *Ruiz Zambrano*:

> As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States ... In those circumstances, Article 20 TFEU precludes national measures which have the effect of *depriving citizens of the Union of the genuine enjoyment of the substance of the rights* conferred by virtue of their status as citizens of the Union.[196]

Addressing the particular circumstances of the case, the Court held that a 'refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect',[197] since 'such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents'.[198] The Court extended the same assumption to the refusal to grant a work permit on the grounds that 'if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union'.[199]

The resulting intervention of EU law in purely internal situations is a truly ground-breaking constitutional development, widely discussed in the academic literature.[200] In subsequent case law, however, the Court placed firm

195. See e.g. Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171.
196. *Ruiz Zambrano*, paras 41-42 (emphasis added).
197. *Ruiz Zambrano*, para. 43.
198. *Ruiz Zambrano*, para. 44.
199. *Ruiz Zambrano*, para. 44.
200. See e.g. K. Hailbronner and D. Thym, 'Comment on Case C-34/09 Ruiz Zambrano' (2011) 48 CMLRev 1253; D. Kochenov and R. Plender, 'EU Citizenship: From an incipient form to an incipient substance? The discovery of the Treaty text' (2012) 37 ELRev 369; H. van Eijken and SA. de Vries, 'A new route into the Promised Land? Being a European citizen after Ruiz Zambrano' (2011) 36 ELRev 704; and F. Wollenschläger, 'A new fundamental freedom beyond market integration: Union citizen-

emphasis on the *exceptional* nature of that intervention, stressing a threshold of *forced* departure from the *territory of the Union* before the genuine enjoyment of the substance of citizenship rights could be considered at risk. In *Dereci*, for example, the Court distinguished such a situation from a claim for family reunification per se:

> [T]he mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.[201]

Additionally, in *McCarthy*, the Court drew a line under the *Chen* judgment: holding a second Member State passport does *not* alter the legal situation of a static citizen who has never left their *home* State – only an obstacle to that citizen's freedom of movement within the Union or forced departure from the territory of the Union will engage the rights conferred by Articles 20 and 21 TFEU.[202]

The Court thus articulated the limits of the *Ruiz Zambrano* test relatively quickly. However, an as yet unresolved issue concerns whether residence rights should be granted to a *primary carer* only, or also to others e.g. the *parents* of minor citizens who qualify for EU protection. The final part of the *Ruiz Zambrano* judgment refers to 'a third country national upon whom his minor children, who are European Union citizens, are dependent'.[203] In *O and S* – a ruling delivered just under two years after *Ruiz Zambrano* – the phrasing is slightly different; and it differs also from the *Chen* language of primary carer: 'a third country national in the Member State of residence of his minor children, nationals of that Member State, who are dependent on him *and of whom he and his spouse have joint custody*, the Court has held that the refusal to grant a right of residence would have the consequence that those children, who are citizens of the Union, would have to leave the territory of the Union *in order to accompany their parents*'.[204] Does this expression

---

ship and its dynamics for shifting the economic paradigm of European integration' (2011) 17 ELJ 34.

201. Case C-256/11 *Dereci*, judgment of 15 November 2011, para. 68.
202. Case C-434/09 *McCarthy* [2011] ECR I-3375.
203. *Ruiz Zambrano*, para. 46.
204. Joined Cases C-356/11 and C-357/11 *O and S*, judgment of 6 December 2012, para. 46 (emphasis added).

of things intentionally soften the harder consequences of *Ruiz Zambrano* when read in the light of *McCarthy* and *Dereci*?

Additionally, the Court stressed in *O and S* that 'while the principles stated in the *Ruiz Zambrano* judgment apply only in exceptional circumstances, it does not follow from the Court's case-law that their application is *confined to situations in which there is a blood relationship* between the third country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be derived' – therefore, 'the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are *legally, financially or emotionally dependent* must be taken into consideration when examining the question whether, as a result of the refusal of a right of residence, those citizens would be unable to exercise the substance of the rights conferred by their status'.[205]

Later in the judgment, the Court turned its analysis to family reunification for third country nationals under Directive 2003/86, emphasising the importance of Article 7 of the Charter, which 'must also be read in conjunction with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both parents'.[206] What does the same obligation require in the context of Articles 20 and 21 TFEU?

We were keen to understand how national authorities – and national courts and tribunals in particular – have responded to the initial fundamental shift in the scope of Union law brought about by *Ruiz Zambrano*, but also the confusion that might be caused by the different *tones* of subsequent judgments, especially in the absence of more detailed legislative guidance. Linking back to the map included in Section 1.2.2 above, the discussion below relates primarily to the States in which the protection of Directive 2004/38 has not been extended, under national law, to static citizens.

205. *O and S*, paras 55 and 56 (emphasis added). See similarly, the report for Ireland (cases outlined at notes 59-62, applying *Ruiz Zambrano* where 'refusal to grant a right of residence or a work permit causing the absence of a family member required for care and social and/or financial support').

206. *O and S*, para. 76; referring to Directive 2003/86/EC on the right to family reunification, [2003] OJ L251/12.

7.2. Responding to the evolving interpretation of primary rights: judicial engagement

Two broad themes are addressed in turn in this Section: first, national judicial absorption of the *limits* of the *Ruiz Zambrano* case law; and, second, the ambiguities in this area that are still emerging through these national cases.

7.2.1. Adhering to the case law: and its limits

On the whole, we found that national courts and tribunals have absorbed the case law on primary rights and its distinctiveness vis-à-vis claims that fall, by contrast, within the scope of the Directive.[207] In the report for the Netherlands, an interesting decision of the District Court of Arnhem is noteworthy for its expansive application of the sufficient resources dimension of *Ruiz Zambrano* – granting not a work permit to the Venezuelan mother of a Dutch child but, rather, entitlement to a social allowance.[208] This issue arises also in the report for the UK, where it is observed that the intervention of the Home Secretary in a case on this question 'suggests that the question of a *Ruiz Zambrano*-based right to social welfare has arisen frequently at the administrative level'. The report distinguishes two kinds of situation in this context: entitlement to social welfare assistance *after* a residence right has been established on the basis of *Ruiz Zambrano*; and whether or not denial of social welfare can *itself* establish such a right on the basis of forced departure.

But we found that particular emphasis has been placed on implementing the *strictness of the limits that followed* in subsequent ruling such as *McCar-*

207. See e.g. the report for the Netherlands (cases outlined at notes 56 and 57 applying *Ruiz Zambrano*, and case outlined at note 65 applying *Chen*); the report for Sweden (on MIG 2009:22 applying *Chen*); and the report for the UK (cases outlined at notes 161-164 applying *Chen*). National case law on citizenship rights extends beyond family reunification too: see e.g. the report for Poland, outlining cases in the areas of tax discrimination and access to benefits. Cf. the report for Bulgaria, where the author suggests that national courts, first, 'do not distinguish clearly between rights acquired under Directive 2004/38 and under Arts 20 and/or 21 TFEU; secondly, that they do not fully apprehend the Court's case-law; thirdly, that there is a general unease when having to address "purely internal situations"' (providing case law examples to illustrate this critique).

208. Report for the Netherlands, text at note 54. Cf. the approach noted in the report for Ireland, case outlined at note 66.

thy and *Dereci*.[209] We also suggest, however, that these national disputes have, in turn, highlighted uncertainties about the intended scope of those limits.

As a somewhat technical but important point, it is worth noting the reference in the report for Germany to a judicial revolution discourse that developed immediately after the judgment in *Ruiz Zambrano*, with the authors noting that German courts and also academics quickly understood the fundamental implications of the ruling and were keen to test its implications. It was shown in Section 7.1 above, however, that the Court of Justice quickly closed down the revolutionary potential of the judgment – something not easily predictable at the time and which could, therefore, have had complex repercussions within quickly reactive national systems.

Addressing the subsequently determined limits of the genuine enjoyment test raises some difficult questions. First, there is *uncertainty about how the 'new' case law relates to the framework constructed in previous decisions*. For example, in the report for Sweden, an expulsion case involving a Colombian mother and her Spanish minor daughter turned on the absence of sickness insurance, with the Migration Court of Appeal ruling that expulsion from Sweden to Spain would not breach the *Ruiz Zambrano* forced departure from the Union threshold. This is certainly correct; and comprehensive sickness insurance is clearly required by Article 7 of the Directive. But how does the decision sit with the ruling in *Baumbast* that 'the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality'?[210] In *Baumbast*, an *element* of sickness insurance was missing from the family's cover – is that the point of material difference?

Picking up on the potentially softening effects of the decision in *O and S,* a case concerning a national of Kosovo who did not have a residence permit in the Netherlands is discussed in that report.[211] She gave birth there to two

209. See e.g. the report for Finland (on KHO 2013:97, emphasising the significance of having custodial rights); the report for France (cases outlined at notes 108-110, applying *Ruiz Zambrano*); the report for Germany (cases outlined at notes 43-44); the report for the Netherlands (case outlined at note 62, where the exercise of free movement rights precluded the applicant from claiming that he had been deprived of the genuine enjoyment of the substance of his citizenship rights); the report for Sweden (on MIG 2011:17, applying *McCarthy*); and the report for the UK (cases outlined at notes 166-170, applying *Ruiz Zambrano* plus *Dereci*).

210. Case C-413/99 *Baumbast* [2002] ECR I-7091, para. 94.

211. Rechtbank 's-Gravenhage, zittingsplaats Roermond, 28 March 2011.

children of Dutch nationality; her partner is also a Dutch national. However, the national court rejected her claim for a residence permit based on *Ruiz Zambrano* on the grounds that her children 'could still enjoy residency in the EU, with their father, who had Dutch nationality'. Again, this decision fits with the clarification of *Ruiz Zambrano* that we find in *Dereci*. But does it fit with the ethos of citizenship when read in the light of respect for family life or the best interests of the child more generally?

Second, and perhaps most fundamentally, there is the issue of *unintended consequences of the strictness of the genuine enjoyment test*. Cases discussed in the report for the Netherlands illustrate this concern very starkly; for example:

> It was ruled that a Moroccan father did not have a derived right to stay in the Netherlands, because the Dutch mother could not take care of the children and the children were forced to stay in a foster home. The Court ruled that in these circumstances, the children were not obliged to leave the territory of the EU. Another example is a case where the Dutch parent was mentally ill and could not take care of her children. It was also held that there was no derived residence right [for] the other parent with the third country nationality.

Again, these decisions are 'correct' in the sense of being in line with the Court of Justice's forced departure test. Moreover, it is fitting that a test activating a role for EU law in otherwise sheltered national regulatory space should be a delimited one. But could the Court really have intended these troubling consequences, and is the outcome really compatible with *genuine enjoyment* of Union *citizenship*?

7.2.2. Managing ambiguities: the particular challenge of scope-in-motion

In other cases discussed in the report for the Netherlands, a different decision was reached – for example:

> The Dutch mother was in the position to take care of her child. Nevertheless, due to the mental illness of the father, the Council of State ruled that the Turkish father had a derived right to reside in the Netherlands. There were indications that a deportation to Turkey would lead to so much psychological suffering that his Dutch spouse and child had no other choice than to join the father and thus to reside outside the EU.

Linking back to the discussion under Q1 on the meaning and nature of dependency, this extract fits with the *wider* understanding of dependency conveyed in *O and S*. At one level, then, this national case perhaps shows an ap-

propriate correction of prior restrictiveness that maps how the trajectory of Court of Justice case law evolved.[212] But an approach concerned with *degrees* of emotional dependency suggests potential for subjective decisions. In the UK, national courts have distinguished between the fact that 'strong emotional and psychological ties within the family would be significantly likely to rupture in instances of separation, *diminishing enjoyment of life in the UK*' (emphasis added) and the *Ruiz Zambrano* forced departure threshold i.e. 'when quality of life is so diminished that an individual is effectively compelled to leave Union territory'. But how is that distinction to be *determined* in practice?

Case law twists also affect the work of national administrative authorities. For example, that the scope of the *Ruiz Zambrano* test is 'very narrow' was confirmed in a ministerial Briefing Note on the judgment discussed in the report for Denmark; it was also noted that the Note has been updated following *McCarthy*, *Dereci*, and *O and S*. The Note prescribes a series of conditions that have to be taken into account in such family reunification cases, including that the case 'must concern the right of residence of a *parent* to a Danish child' – but in line with the *O and S* benchmark of '*persons* on whom those citizens are legally, financially or emotionally dependent', the Note goes on to clarify that 'the parent does not need to be the biological parent, but can be another adult on whom the child is dependent'.

The point that forced departure of a Danish child who has a third country national parent, broadly understood, from the Union territory is 'most likely where there is *no other parent with whom the child can live*' (emphasis added) would seem to avoid some of the more difficult outcomes discussed earlier with respect to case law in the Netherlands, where foster care, for example, was deemed to be an appropriate alternative to granting a parental residence permit.[213] But, as the author points out, restrictiveness taints other elements of the Danish system: for example, 'a right of residence pursuant to Art 20 might also arise in cases where the Union citizen is not a child, but an adult who is dependent on another person for his financial and emotional needs'.[214]

212. See also, the report for Germany, reflecting this point through the comparison between the narrow approach applied in *Dereci* and a greater flexibility presumed after the *O and S* ruling.
213. See also, the report for the UK, cases outlined in notes 169-170; including a decision in which it was recognised that 'Union citizen could not be cared for by their abusive Italian father if their Argentine mother were deported'.
214. This question is also raised in the Institutional Report.

Interestingly, the author also queries the compatibility of Danish rules with EU law on the point about 'refusal to give a right of residence under EU law to the other parent who is also a third-country national (Mrs Zambrano)'. As noted in Section 7.1, it is not clear from the decision in *Ruiz Zambrano* what the status of the children's mother actually is. Could she be considered to be a *primary carer* alongside the father's position as a parent on whom the children are *dependent* in a *different* i.e. material way? In the report for the UK, national regulations provide that 'where a Union citizen minor has two primary carers ... *both* primary carers must be required to leave the UK before a derivative right can be enjoyed' by the person who has primary responsibility for care. The position of *parents* alongside or as opposed to *primary* carers is clearly something that needs to be clarified.[215]

As a final point, and linking back to the discussion in Section 4.2.1 above, it is still unclear whether family members who derive their rights of residence from the primary rights of Union citizens can also acquire permanent residence rights on that basis.[216] It is suggested here that a distinction may be drawn between rights claimed on the basis of *Ruiz Zambrano* – i.e. cases that involve residence rights in a Union citizen's *home* State and so do not fall within the scope of Directive 2004/38, the sole repository of the status of permanent residence[217] – and rights based on the decision in *Chen*. In the latter case, self-sufficiency was a critical factor in the granting of the residence right under EU law, and it is difficult to see how periods of residence accrued on that basis could be deemed *not* to meet the requirements of Article 7 of the Directive – and thus the requirements of 'legal residence' under Article 16 too.

215. The case law on residence rights derived from the children of migrant workers in host State education opens a window here: 'where children enjoy ... the right to continue their education in the host Member State, although the parents who are their careers are at risk of losing their rights of residence, a refusal to allow *those parents* to remain in the host Member State during the period of their children's education might deprive those children of a right which has been granted to them by the legislature of the European Union' (Case C-529/11 *Alarape and Tijani*, judgment of 8 May 2013, para. 26, emphasis added).
216. This question is also raised in the Institutional Report.
217. A point reflected in national regulations discussed in the report for the UK.

7.3. Responding to the evolving interpretation of primary rights: legislative and administrative change

Our questions focused primarily on how national courts and tribunals are managing the Court of Justice's case law, but some authors raised issues about how family reunification issues are covered by national legislation – and/or whether developments such as *Ruiz Zambrano* prompted amendments to national rules, some of which have already been outlined in Section 7.2.[218]

In the report for the Netherlands, it was noted that discussions about whether or not the developments in Court of Justice case law require legislative change at national level are ongoing. The same point was made in the report for Ireland, but here, pointing to specific concerns that have been raised because of the absence of a 'comprehensive approach to family reunification' – in fact, it was noted that 'Ireland is the only EU Member State not to have such rules enshrined in legislation' at all.

7.4. Question 7 – emerging issues and themes

On the whole, the examples discussed in this section show a national judiciary trying hard to discern and to follow the twists and turns of jurisprudence-in-progress at EU level. The openness of national courts and tribunals to case law change and, more particularly, the **implications at national level of rapid *EU-level* case law correction** can be seen in several of the national cases discussed.

At one level, it is an entirely **natural and expected characteristic of case law that subsequent decisions sharpen the scope of relevant principles and tests**. It is often only through later cases that the *layers* inherent in principles and test are revealed through the lens of different facts-sets.

The difficulty here is simply that the judgment in *Ruiz Zambrano* initiated such an intensive *wave* of responses, at all levels: not just through litigation but also, as pointed out in the Institutional Report, 'an increasing number of citizens' complaints, petitions and parliamentary questions on this new line of jurisprudence'. That Report attributes the force of this 'stimulating effect' to the fact that the judgment in *Ruiz Zambrano* 'appeared to offer a whole new world of EU law-argumentation to long-standing constellations and issues

218. See e.g. the reports for Denmark, France, and the UK.

that were considered problematic or unsatisfactory but for which no EU law remedy seemed traditionally in reach'.

Additionally, the discussion has revealed several examples of **questions and ambiguities that need still to be resolved** – e.g. what rights beyond residence and the right to work attach to a residence right grounded in *Ruiz Zambrano*? Are parents or only primary carers – whether parents or not – protected under EU law in these kinds of internal situations? And finally, linking back to the discussion under Q1, what does dependency really mean in non-conventional situations? A continuing stream of preliminary references is inevitable in this regard.

The responses received to this question also reflect earlier discussions about the **pioneering capacity of EU law** – about when that function *should* kick in; but also, when it should *not*. This point also revives questions about **the role(s) of the legislature(s)**: at national level, on the one hand – to cite AG Sharpston on this point, as the Institutional Report does, '[w]hy a Member State would wish ... to treat its own nationals less favourably than other EU citizens ... is curious'[219] – but also at EU level: specifically, when critical developments occur through case law, at what point is a *responsibility* to step in established, in order to provide framing and unifying legislative guidance on questions where there is clear inconsistency of approach; or does case law in fact serve its own *autonomous* purpose?

Question 8

In the context of the judgment in *Rottmann*, to what extent do rules on the acquisition and/or loss of national citizenship reflect the implications of the particular requirements of EU citizenship? Please consider the EUDO Citizenship Observatory data on acquisition and loss of citizenship in answering this question.

Article 9 TEU

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

219. AG Sharpston, Joint Opinion for Case C-456/12 *O* and Case C-457/12 *S*, judgments delivered on 12 March 2014, para. 86 of the Opinion.

Article 20 TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

8.1. Introduction – the interdependency of national laws and EU law on citizenship

Through Question 8, we wanted to interrogate more closely the relationship between national citizenship – and, specifically, national rules on the acquisition and loss of citizenship – and EU citizenship. EU citizenship, as is well known, only attaches to those who have the nationality or (in some language versions, e.g. Italian or Spanish) the 'citizenship' of a Member State. What is meant by this is that the group of EU citizens is the same group as those who are recognised by law, both internally and externally, as being members of a particular national polity (i.e. a Member State), whether they have acquired that citizenship at birth or afterwards.

Some Member States have strengthened that link, by making it easier for EU citizens from other Member States to acquire national citizenship when resident in the host State (e.g. Czech Republic (from 2014), Hungary, Ireland, and Italy[220]). This can offer an important complement to the benefits of permanent residence under Directive 2004/38, because it also ensures that, as a citizen, that person can vote in national elections and does not suffer possible disenfranchisement.[221]

The interdependency of national laws on citizenship and EU law has become more complex over the years. This is a result of the development of the constitutional concept of EU citizenship, complementing and building upon the free movement rights established in the founding Treaties. It also owes much to the case law of the Court of Justice, which has established a number of principles regarding the implications of EU law for what one might expect – *prima facie* – to be the freedom of Member States to apply their own citizenship laws, subject only to the strictures of international law.

220. This typically involves shorter residence periods.

221. Commission Communication, *Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement*, COM(2014) 33; this initiative is discussed in detail under Q12 below.

In a first step, the Court established a principle of mutual recognition. Already, in the pre-EU citizenship era, the Court concluded in *Micheletti* that as regards a dual citizen, a Member State was not at liberty to treat that person as a third country national if he or she also held the citizenship of a Member State.[222] The Court held that 'it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty'.[223]

The specifics of national citizenship laws returned to the Court in the *Chen* case,[224] where a third country national family had relied upon the particularities of Ireland's (then) rules on *ius soli* acquisition of citizenship by all children born on the island of Ireland to ensure that their child acquired Irish nationality without leaving the territory of the UK. Again, the UK was required to recognise the legitimate acquisition of the citizenship of another Member State, which gave the child (and thus her mother, as her primary carer) a right of residence in the UK. It is well known that it was cases such as this that lay behind a change to the law in Ireland in 2004, on the basis of a constitutional referendum.[225]

By the time the *Rottmann* case came before the Court,[226] its formulation of the interaction between EU law and national law in relation to citizenship had moved on yet further. It now comprised, on the one hand, the assurance from the Court to the Member States that the rules of acquisition and loss of citizenship were in principle a matter for national law (subject to international law, of course), but, on the other hand, a familiar assertion that 'the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter'.[227]

Operating the national rules of acquisition – or, in *Rottmann* more particularly, of loss – with due regard to EU law means seeing in the first place

222. Case C-369/90 *Micheletti* [1992] ECR I-4239.
223. *Micheletti*, para. 10.
224. Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.
225. See the report for Ireland at note 69 *et seq*.
226. Case C-135/08 *Rottmann* [2010] ECR I-1449. For extended discussion by a number of commentators, see J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper 2011/62, available at http://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS_2011_62.corr.pdf?sequence=3.
227. *Rottmann,* para. 41.

whether this is a matter that falls within the ambit of EU law. Taking a decision to withdraw a naturalisation decision, even one procured by fraud, where this means that the person ceases to be a citizen of the Union because he or she has also lost the citizenship of the original state on acquisition of another citizenship, is a situation which 'by reason of its nature and consequences' falls within the ambit of EU law.[228] For losing EU citizenship means losing all the rights attached to that status.[229] Thus, in the circumstances, it is reasonable to subject even a decision to withdraw a naturalisation decision to judicial review carried out in the light of EU law.[230]

It is not unreasonable in principle for Member States to protect the public interest by withdrawing a naturalisation decision obtained by means of fraud or deception, in order to protect 'the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality'.[231] Withdrawing nationality obtained by deception would not be – in the Court's reading of international law – an arbitrary act, and thus it would, in principle, be in accordance with the requirements of international law. But losing EU citizenship as a consequence of the withdrawal decision does add a further element to the argument, according to the Court, because of 'the importance which primary law attaches to the status of citizen of the Union' (i.e. 'destined to be the fundamental status of the nationals of the Member States', etc.).[232]

In practice, what EU law demands is a test of proportionality, which takes into account both the nature of the deception and the consequences that the decision entails for the person in question and for the members of his or her family. The issue as to whether it is possible for the person affected to recover his or her original nationality would also be a matter to take into account – and whether, perhaps, he or she might be afforded a period of time in order to achieve this challenge – although the fact that the person affected has not (yet) recovered the original nationality is not in and of itself a reason to refrain from withdrawing nationality.

228. *Rottmann*, para. 42.
229. *Rottmann*, para. 46.
230. *Rottmann,* para. 48.
231. *Rottmann*, para. 51.
232. *Rottmann*, para. 56.

8.2. Implementation of the Rottmann judgment

As regards the implementation of the judgment in *Rottmann* at national level, we found little evidence in the national reports that the ruling has had a major disruptive effect upon national law or national procedures. Sweden offers a rare case where there has been a specific endeavour to review how EU law impacts upon citizenship law in the context of the work of a Commission of Inquiry on Swedish Citizenship.[233] For some States (e.g. the Netherlands), the principle of proportionality is already part of national law so far as concerns citizenship, and the Guide to the Netherlands Nationality Act has long referred to the role of proportionality in decisions withdrawing citizenship.[234]

There are very rare instances of specific reference being made to *Rottmann* in national law.[235] It is possible that this is because these types of situations arise relatively rarely (and even more rarely come before the courts); additionally, so far, there has been a tendency to confine the *Rottmann* judgment to its rather specific facts.[236] In other words, the issue would only arise in circumstances where the person affected had been required to renounce their previous citizenship in order to acquire the host State citizenship, or had lost their home State citizenship by operation of law when they acquired the citizenship of another state. Where states do not require surrender of the previous citizenship, it is already less likely that a *Rottmann*-type case will arise.[237] It will also not arise if there is a rule in national law prohibiting the withdrawal of citizenship (even in cases of fraud, e.g. Sweden) where this renders a person stateless (e.g. Bulgaria, Slovenia) or restricts the withdrawal of nationality to cases where the person acquires another citizenship or acts contrary to the interests of the State (Greece); where there is a prohibition on withdrawing citizenship, even if obtained by fraud (e.g. Croatia); or where there is no requirement to surrender the first citizenship if a person is acquiring a second one (e.g. Croatia).

233. See the report for Sweden at note 20.
234. See the report for the Netherlands at note 66.
235. See e.g. in the report for Estonia, where the updated commentary to the Constitution refers to the requirement that conditions of acquisition and loss of citizenship must have due regard to EU law.
236. One Member State where these sorts of situations have arisen because of the insularity of citizenship law (which requires surrender of the previous citizenship) is Denmark, and its pre-*Rottmann* case law does seem questionable in this light; see that report at note 74.
237. On this point, see e.g. the reports for France, and Ireland.

Quite a number of States also provide for citizens who have voluntarily surrendered their citizenship to re-acquire it (e.g. Croatia, Finland, Hungary, Slovenia, UK).[238] Increased toleration of dual citizenship, exemplified by recent changes in the Czech Republic and Latvia, further closes the risk that another *Rottmann*-type case could arise in a purely intra-EU context. However, that leaves open the question of loss of citizenship where the national citizenship at issue is the *only* EU citizenship that the person affected has, regardless of whether it otherwise renders the person stateless.

There seems to have been little appetite in national courts to explore these and related issues. Thus no further analogous or complementary cases have been referred to the Court of Justice. For instance, in Ireland, the case of *Mallak*[239] saw the High Court insisting firmly that *Rottmann* only applied to *loss* and not to decisions on *acquisition* of citizenship. A Dutch court decided that the withdrawal of a grant of citizenship to a Somali citizen who had given false identity information did not trigger the *Rottmann* case because the Somali national had never properly acquired Dutch, and therefore EU, citizenship.[240]

The UK's rather broad provisions on deprivation of citizenship in circumstances where this is 'conducive to the public good' seem in principle to be defensible by reference to the comment in *Rottmann* that Member States are allowed to justify revocation decisions by reference to reasons 'relating to the public interest'.[241] That said, as the UK has now extended its legislative provisions to make it possible for a person to be deprived of citizenship in these circumstances (e.g. if suspected of serious terrorist offences) even if that renders him or her stateless, it seems difficult to see how the argument put forward by the Court of Appeal in *G1* v *Secretary of State* denying a cross border element in the circumstances where a person was deprived of their UK citizenship can continue to be justified.[242] Since the majority of the deprivation decisions taken by the UK authorities in recent years have been taken specifically when the person concerned is not in the UK (and usually not

238. Or rather, in some cases, the release granted (in order to obtain another citizenship) does not come into effect because the person does not provide evidence that he or she has acquired another foreign citizenship; see e.g. the reports for Croatia, and Slovenia.

239. *Mallak v Minister for justice, Equality and Law Reform* [2011] IEHC 306, paras 25-61.

240. See the report for the Netherlands at note 67. This would mean applying the *Kaur* case rather than the *Rottmann* case: Case C-192/99 *Kaur* [2001] ECR I-1237.

241. *Rottmann*, para. 51.

242. *G1* v *Secretary of State* [2012] EWCA Civ 867.

elsewhere in the EU), the likelihood that they will thereby be deprived of the substance of their rights as EU citizens seems very high.

8.3. The wider implications of Rottmann

There also seems to be little evidence of national courts exploring further some of the wider implications of *Rottmann*, such as whether the references to the role of judicial review in decisions on the loss of citizenship could also be extended to require judicial review in relation to decisions refusing the acquisition of citizenship (e.g. in the case of decisions refusing ordinary naturalisation). And yet, the Institutional Report highlights, in particular, that the Court's judgment in *Rottmann* may open up new avenues to explore the bringing of other aspects of access to national citizenship under judicial control, under the optic of having 'due regard' to EU law; although it suggests that *Rottmann* alone might provide a weak basis for this, since what is needed is a wider impact upon EU citizenship to trigger a broader EU interest.

As yet unpublished research by de Groot and Vonk[243] charting national practices on judicial review and the reasoning of citizenship decisions is premised on the significance of *Rottmann* for national citizenship law practices, when combined with Articles 11 and 12 of the European Convention on Nationality (which does not bind all of the Member States but which sets a useful international benchmark) – which provide for the reasoning and judicial review of citizenship decisions – as well as the 2011 European Court on Human Rights judgment in *Genovese* v *Malta*.[244] This case establishes for the first time that measures relating to citizenship can be brought within the scope of the ECHR if they affect fundamental rights such as the right to non-discrimination affecting a person's social identity. In their work, de Groot and Vonk show that, at present, 27 of 35 European States surveyed provide for judicial review of negative decisions refusing ordinary residence-based naturalisation.

243. G-R. de Groot and O. Vonk, 'Scrutinising Citizenship Decisions: Analysing Judicial Review in Europe', Paper presented at the ACIT Mid-Term Workshop on *Comparing Citizenship Across Europe: Law, Implementation and Impact*, EUI Florence, June 2012 (held on file by J. Shaw).

244. *Genovese* v *Malta*, Application Nr. 53124/09, 11 October 2011. The case involved a challenge to a Maltese law that discriminated between children born out of wedlock between Maltese mothers and Maltese fathers.

It is interesting to note that at least one additional Member State has begun to permit judicial review of naturalisation decisions since this survey was conducted (Denmark), specifically on the grounds that there is a need to allow judicial review to ensure that in naturalisation decisions Denmark's international obligations are respected.[245] There is perhaps more scope for courts to explore possible conflicts between EU law and the Danish Nationality Act, which draws distinctions between children born in Denmark and those born in another country. As nationality law issues are a hot topic in Denmark at the present time, as that report notes, there may be potential for the courts to become more involved in the future, applying the *Rottmann* principle of proportionality. We could also expect further litigation if the commentary on the Estonian Constitution noted above comes into play in that State. As with Denmark, Estonia does not permit dual citizenship in the context of naturalisation.

Another legal issue that may be explored in the future is the situation of dual citizens by birth (e.g. by *ius sanguinis* from both parents, or by a combination of *ius soli* through birth in the territory to settled parents and *ius sanguinis* through the parents), where one or more of the states requires the child to make a choice at the age of 18. This could theoretically be an issue in Estonia; but since Estonian law makes no provision for depriving a person who acquires citizenship by birth of that citizenship, then there is no procedure to enforce the theoretical choice.

The issue has already arisen in Germany, where children who acquire dual citizenship at birth are supposed to make a choice within five years of reaching 18 as to which they choose. This so-called *Optionspflicht* does not apply where the other citizenship that the child holds is that of another Member State. Enforcing the option thus means that the child has to choose between EU citizenship (via German citizenship) and third country citizenship. The option has been criticised for imposing an unreasonable choice on the children in question (the first cohort of whom reached 23 in 2013), and for forcing a choice that many do not have to make. For example, while (legally speaking) Germany is still in principle hostile to dual citizenship, in practice it is widespread, both because of the exception allowed for citizens of other Member States to hold that citizenship with German citizenship, and because it does not require those who naturalise to renounce the citizenship of another

245. Judgment of the Danish Supreme Court of 13 September 2013 in Case 306/2012; see also the note in the EUDO Citizenship Observatory case law database available at http://eudo-citizenship.eu/databases/citizenship-case-law/?search=1&name=&year=&country=Denmark&national=1).

state if it is impossible so to do.[246] Not least because of the increased political saliency of the issue in 2013, the latest German coalition government agreed in November of that year to abolish this controversial provision, this being one of the prices exacted by the Social Democratic Party as a condition for entering government with the Christian Democratic Union.[247]

8.4. Rottmann and citizenship by investment

The potentially wider significance of *Rottmann* was brought into the public eye in 2013 and 2014 by the controversy surrounding the proposal by Malta to 'sell' national citizenship to investors and other wealthy persons. This brings us back to the question raised in the Institutional Report, whether the case for applying *Rottmann* also to the acquisition of citizenship is premised upon being able to point to some negative impact upon rights protected by EU law or the status of EU citizenship more generally.[248] This would mean giving such persons automatic access to Union citizenship and thus to all its rights and duties – notably, rights of free movement and residence throughout the territory of the Union (Article 21 TFEU).

Unsurprisingly, the Maltese proposal attracted a great deal of comment – most of it negative in character – about the ethics of 'selling' citizenship,[249] with a minority of comments focused more specifically on the question of the

246. C. Morehouse, 'Although legally an exception, dual nationality has become the rule in Germany', EUDO Citizenship Observatory, 7 March 2012, available at http://eudo-citizenship.eu/news/citizenship-news/606-although-legally-an-exception-dual-nationality-has-become-the-rule-in-germany.

247. L. Block, 'Germany: Coalition government parties agree to scrap 'option model' for ius soli children', 28 November 2013, available at http://eudo-citizenship.eu/news/citizenship-news/998-germany-coalition-government-parties-agree-to-scrap-option-model-for-ius-soli-children.

248. Institutional Report, notes 175-176.

249. A. Shachar and R. Bauböck (Eds), *Should Citizenship be for Sale?*, EUI Working Paper RSCAS 2014/01 (available at http://eudo-citizenship.eu/images/docs/Citizenship-for-Sale-RSCAS_2014_01.pdf); S Peers, 'Want to be a EU citizen? Show me the money!', available at http://eulawanalysis.blogspot.co.uk/2014/01/want-to-be-eu-citizen-show-me-money.html, 28 January 2014. For references to other commentaries, and also to news reports, see the work of the European Parliamentary Research Service (http://epthinktank.eu/2014/01/15/eu-citizenship-and-residence-permits-for-sale/) or visit the EUDO Citizenship Observatory country profile page for Malta and see the news items presented there (http://eudo-citizenship.eu/country-profiles/?country=Malta).

interface with EU law. The original proposal was to grant citizenship based on a donation to the State treasury of €650k. Subsequent amendments raised this to €1.15m, including the acquisition of government bonds and property, at least for a certain period of time. Finally, after pressure was brought to bear by the European Commission, which announced that it intended to bring infringement proceedings against Malta, and by the European Parliament, which agreed a resolution condemning citizenship for sale because of the implications for Union citizenship,[250] the Government conceded that more needed to be done to demonstrate a real link between the State and the individual investor seeking citizenship before the grant of citizenship, and so instituted a one-year residency rule.[251] This decision leaves open, however, the question of how the Member State might interpret the residency requirement.

This entire story leaves many questions unanswered, for the Maltese scheme is by no means unique, as the European Parliament's ThinkTank's own research demonstrates, and as has been fully analysed by writers such as Jelena Džankić.[252] 'Investor citizenship' or so-called 'golden residence' schemes (which give investors residence permits, and often Schengen visas, and a rapid pathway to citizenship for them and their families) are common in the EU Member States. Greece, Hungary, Latvia, Portugal, Spain, and the UK have the latter. Austria, Bulgaria, Cyprus, and now Malta have versions of the former. Furthermore, if residence is to be the key issue in scrutinising of the granting of national citizenship given its implications for Union citizenship, what then of the external citizenship programmes of numerous EU Member States, including Croatia, Hungary, and Italy, which see the descendants of former emigrants (re)acquiring national citizenship on the basis of rather tenuous historic or ethnic ties across multiple generations?

The crucial EU law question seems, therefore, to be whether 'due regard to EU law' in relation to the operation of national citizenship laws triggers, in

250. European Parliament Resolution of 16 January 2014, P7_TA-PROV(2014)0038, voted on after a debate in plenary on 15 January where parliamentarians queued up to condemn the Maltese scheme.

251. See the joint press release of the Maltese Government and the European Commission, MEMO 14-70, 29 January 2014, available at http://europa.eu/rapid/press-release_MEMO-14-70_en.htm.

252. For a shorter summary of Džankić's reflections, see 'Can Money Buy Citizenship?', *Citizenship in South East Europe*, 6 February 2012, available at http://www.citsee.eu/citsee-story/can-money-buy-citizenship. See also, Džankić's full paper on 'The Pros and Cons of *Ius Pecuniae*: Investor Citizenship in Comparative Perspective', EUI Working Papers, RSCAS 2012/14, available at http://cadmus.eui.eu/handle/1814/21476.

turn, the duty of loyalty in Article 4(3) TEU, which provides that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. [...] Member States shall refrain from any measure which could jeopardise the attainment of the Union's objectives'. It is clear that the intertwining not only of national citizenship and EU citizenship, as exemplified in the previous paragraphs, but also of the citizenship regimes of the Member States *inter se*, could trigger the principle of sincere cooperation. Whether it could do so to the extent that the Commission could successfully bring a Member State before the Court of Justice in respect of its creation of a new scheme for naturalisations where there appears to be a weak link between the putative citizens and their new State is a moot point, and the Maltese case is not now going to test it. But the point remains, as the Institutional Report rightly states that the Member States could and should work together more closely in the area of nationality, in order to 'share knowledge and experience on conditions and procedures for obtaining Member States' nationality.'

8.5. Question 8 – emerging issues and themes: the 'value' of citizenship

What emerges from the discussion above is one of the paradoxes of EU citizenship. We can see how **the value of (national) citizenship is enhanced as a status by operation of EU law and by the rights attaching to EU citizenship**. It is hence an attractive status, a point recognised in some of the post-2004 Member States (such as Poland[253]), as well as being explicit in reactions to the Maltese investor scheme.

And yet, as many have noted, as a rights-status, **national citizenship has been hollowed out by EU citizenship**, with very few rights reserved by States for national citizens alone. This is partly because of the operation of EU law, but in a few cases it is because of national choices made by Member States (e.g. the intertwining of citizenship and citizenship rights in Ireland and the UK). This has led commentators such as Gareth Davies to wonder what is left of national citizenship, if residence is the new reference point.[254] It seems likely, as the Institutional Report notes, that the intertwining of these two statuses is likely, in the future, to lead to **more, not less, cooperation be-**

253. See the analysis of the Constitutional Tribunal decision on Article 30 of the Act on Polish Citizenship in the report for Poland.

254. G. Davies, ''Any Place I Hang My Hat?' or: Residence is the New Nationality' (2005) 11 ELJ 43.

tween the institutions and the Member States, and amongst the Member States themselves.

Political rights of EU citizens

This section of the Report deals with the political rights of EU citizens under EU law. Notwithstanding the emphasis in the Lisbon Treaty on the participatory and representative nature of democracy in the Union legal order, the Member States continue to lag behind the vision spelled out in the Treaties and by the EU legislature with respect to the realisation of appropriate electoral rights for Union citizens. This set of questions examines:

(1) The implementation of **Directive 93/109 on European Parliament elections**;[255]
(2) The implementation of **Directive 94/8 on local elections**;[256]
(3) The extent to which Union citizens residing in a host State are granted **electoral rights for regional and other elections** under national law i.e. above and beyond the threshold requirements set out in the Treaties; and
(4) **National restrictions imposed on access to the electoral rights applied to Union citizens**, including those imposed on their own citizens that may be affected by EU law.

Through these questions, we were asking national rapporteurs to explore how each Member State integrates these rights into the domestic political system. We wanted to know not only how well the two key Directives giving effect to Articles 20(2)(b) and 22 TFEU have been implemented at national level, but also whether the Member States have chosen in any way to go beyond the scope of current EU law in the granting of electoral rights. It was important too to see how the Member States have gone about using the derogations provided for in the Directives. This was one way in which we could open up the question of how EU electoral rights might develop in the future.

255. Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] OJ L329/34, as amended by Directive 2013/1/EU, [2013] OJ L26/27.
256. Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L368/38.

Although drafted in the same way in the Treaty, the two sets of rights have slightly different purposes and rather different roots. While it is partly the purpose of the European Parliamentary electoral rights to make migrant EU citizens feel at home and better integrated in their host State, these rights are also underpinned by a sense of the significance, for the EU, of the direct elections to its own parliamentary body introduced in 1979[257] and of the need to ensure that all EU citizens resident in the Union should have the right to vote in these elections. D'Oliveira called these twin roots 'the emergence of a Community or Union collectivity' and 'the principles of democracy'.[258]

Of course, one of the paradoxes of European Parliament elections is that they are in large measure still regulated by national law, notwithstanding the existence of the Act on Direct Elections, so that the rules concerning, for example, EU citizens resident outside the territory of the Union fall to be decided by each individual State in respect of their own citizens.[259] In addition, in the political sphere, it is still the case, 35 years after the first direct elections, that there is little evidence of Europe-wide electoral campaigning based on transnational party programmes, or of key political figures who are seeking the approval of the electorate on a the basis of an identifiable political programme.

This has changed somewhat in the 2014 European Parliament elections with several (but not all) of the transnational parties selecting in advance a candidate for the position of Commission President who would expect to be endorsed by the European Council as a single name proposal for approval by the European Parliament under Article 17(7) TEU, assuming it was their par-

257. The original Act on Direct Elections dates from 1976, and – as with the most significant and recent amendment in 2002 to ensure that all elections are conducted according to some form of proportional representation system – had to be ratified by the Member States in accordance with their respective constitutional requirements. See Council Decision 2002/772 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage annexed to Decision 76/787, [2002] OJ L283/1. Article 223 TFEU continues to require a unanimous vote in the Council, the consent of the Parliament, and ratification by the Member States of any provisions necessary for the elections of the Members of the Parliament by direct universal suffrage.

258. HUJ d'Oliveira, 'European Citizenship: its Meaning, Its Potential', in R. Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union?* (Sweet & Maxwell, 1994) 126 at 142. This point is discussed in more detail in J Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, (Cambridge University Press, 2007) Chapter 4.

259. Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

ticular party group which won most seats in the EP elections.[260] But even the Court of Justice has acknowledged that what we have had so far have been (now 28) separate national elections, in which national issues predominate over EU ones.[261] We still stand a long way away from truly 'federal' European Parliament elections.

The grant of local voting rights, meanwhile, was very much the expression of the idea of giving mobile EU citizens certain participation rights that reflect their residence, and these rights find a reflection, more generally, in the Council of Europe's Convention on the Political Participation of Foreigners in Local Life,[262] which obviously extends beyond the confines of the Union. These political rights represent one response to the challenge of integrating migrant EU citizens in the communities where they find themselves as a result of exercising their free movement rights. They do not differ, in that respect, from the local electoral rights granted for many decades to *all* non-citizens by a number of States (e.g. the Nordic countries, Ireland, and the Netherlands) or established more recently by a number of older and newer Member States (e.g. Belgium, Hungary, Luxembourg, and Slovenia). However, they do remove discriminatory residence requirements, which those States that enfranchise third country nationals usually include (when compared to the treatment of citizens).[263]

In some cases, the reasons for recent extension of rights have been related to the particular position of one non-citizen group (e.g. see the reports for Estonia and Lithuania, as regards Russians and other ex-USSR citizens). In fact, because EU electoral rights specifically privilege certain groups of 'second country nationals', they could be said to have more in common with those measures in place in States that only enfranchise certain groups on the basis of historical ties (e.g. the UK, with its electoral rights for Irish and Commonwealth citizens) and/or reciprocity (e.g. Portugal and Spain).

---

260. See, for the European Parliament's wish list around the 2014 EP elections, its resolution of 22 November 2012, on the elections to the European Parliament in 2014, P7_TA(2012)0462. This includes urging the European political parties to nominate candidates for the Presidency of the Commission and calling for as many members of the next Commission as possible to be drawn from Members of the European Parliament, to reflect the balance between the two chambers of the legislature.
261. Case C-145/04 *Spain v UK (Gibraltar)* [2006] ECR I-7917.
262. ETS No. 144.
263. For example, the 1996 implementation of the municipal elections Directive by the Netherlands involved only the removal of the requirement that a non-national should have resided in the Netherlands for five years before being able to vote in local elections.

At the same time, however, the EU provisions are a constitutional novelty for many States that would otherwise have a constitutionally-based prohibition on allowing any person who was not formally a member of the polity (i.e. a citizen who is part of the demos) to vote in *any* elections. This is the case in Germany and Austria, where previous constitutional court cases had struck down attempts at local or city level to introduce voting rights for third country nationals.[264] Numerous other States had to change their constitutions to accommodate EU electoral rights (e.g. Portugal). Interesting tests of the constitutionality of EU electoral rights – albeit within a framework where none of the courts involved appeared to be questioning the primacy of EU law – came in France and Poland,[265] producing reflections upon the concept of the 'national people', in its various guises, in the post-EU citizenship era.

We also wanted to gather data on whether, were the Court of Justice to confirm a substantive (citizens') right to vote in European Parliament elections under EU law, buttressed by Article 39(2) of the Charter of Fundamental Rights, there is substantial scope for conflict between national law and EU law in this context. This might mean, for example, reading across case law on Article 3 of Protocol 1 to the ECHR, such as *Hirst (No 2)* (on the disenfranchisement of prisoners)[266] and *Kiss* (on the disenfranchisement of persons with mental disabilities)[267] into fact situations that fall within the scope of EU law. Such a move would, however, require a decisive extension of the Court's previous case law on the scope of the right to vote in European Parliament elections in *Eman and Sevinger,* which was, at best, ambiguous on this point.

This is one of the areas in which the Charter may have a substantive impact upon the exercise of the rights of EU citizenship in the future (see also Q14). We directed the attention of the national rapporteurs to a line of case law in the UK in which the applicants argued *inter alia* that the total ban in national law on prisoners' voting rights in relation to the prospective European Parliament elections in June 2014 was disproportionate, although, in the

264. For discussion of these cases, see Shaw, *The Transformation of Citizenship*, Chapter 9.

265. See respectively, Conseil Constitutionnel, judgment of 9 April 1992, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1992/92-308-dc/decision-n-92-308-dc-du-09-avril-1992.8798.html; and Judgment of 31 May 2004, K 15/04, available at http://www.trybunal.gov.pl/eng/summaries/documents/K_15_04_GB.pdf

266. *Hirst v United Kingdom (No 2)* App no 74025/01 (2006).

267. *Kiss v Hungary* App no 38832/06 (2010).

event, all such arguments were rejected by the UK Supreme Court in an October 2013 judgment.[268] This was perhaps unsurprising, in view of the politicisation of prisoners' voting rights in the UK at present and the ongoing refusal by the UK Parliament to take steps to ensure Convention-conformity of UK law in this area by amending the current blanket disenfranchisement.[269]

Questions 9 and 10[270]

Since when has Directive 93/109/EC on European Parliament elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts?

Since when has Directive 94/80/EC on local elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts?

Article 20(2) TEU

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

...

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

268. The Scottish case of *McGeoch v Lord President of the Council* [2011] CSIH 67 and the English case of *Chester v Secretary of State for Justice* [2010] EWCA Civ 1439 were conjoined before the Supreme Court. A seven-member Supreme Court bench unanimously rejected all the applicants' contentions (which related to the ECHR as well as to EU law); see [2013] UKSC 63.

269. For full details of the debate on prisoner voting in the UK, see House of Commons Library Standard Note SN/PC/01764, *Prisoners' Voting Rights*, last updated 15 January 2014.

270. In this section of the Report, we treat the responses to and discussion of Questions 9 and 10 together – resulting in Sections numbered 9.2/10.2 etc in order to maintain consistency. We also draw on data from the FRACIT reports, especially in cases where there was not FIDE report for a particular State.

Article 22 TEU

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 223(1) TFEU

The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements.

9.1./10.1. Introduction – EU electoral rights

In 1993 and 1994, the EU legislature adopted the measures necessary to give effect to the electoral rights for resident EU citizens introduced into what was then the EC Treaty by the Treaty of Maastricht. The timescale for the implementation of the 1993 EP Elections Directive was tight: it was adopted on 9 December 1993, and the first elections to be conducted under its provisions were held in June 1994. All 12 then Member States were able to do so in time, and indeed every acceding Member State has successfully implemented Directive 93/109 since then.

The 1994 Local Elections Directive, adopted in December 1994, allowed for a more relaxed implementation timetable of one year; but, in fact, only four of the 12 Member States managed to implement the Directive on time. Gradually, each of the Member States introduced implementing provisions as they held local elections (which, of course, are held on different timetables in every Member State) and it was not until 2001 that the Directive was first applied in France. Belgium was the slowest Member State to comply, partly because of internal difficulties within the complex Belgian quasi-federal system connected to obtaining all of the necessary consents to the implementing legislation; it only finally complied after an enforcement action was brought by the Commission before the Court of Justice.[271]

The key to the equal treatment rights contained in both Directives is providing for equivalence of residence. For example, Article 5 of Directive 93/109 provides:

> If, in order to vote or to stand as candidates, nationals of the Member State or residence must have spent a certain minimum period as a resident in the electoral territory of that State, Community voters and Community nationals entitled to stand as candidates shall be deemed to have fulfilled that condition where they have resided for an equivalent period in other Member States.

In addition, the Directives set out various principles giving substantial leeway in implementation by the Member States. In practice, because of the diversity of practices among the Member States – e.g. in relation to registration practices – the reality of 'Union voting' is perhaps more complex than the simplicity of the Treaty provisions would at first blush suggest. For example, in relation to European Parliament elections, so-called 'Union voters' have freedom of choice to vote in the host State or in the home State (where this is possible – it is not in all Member States[272]), but they may only vote in one Member State. Likewise, they may only stand as a candidate in one Member State. Operationalising this option can become complicated: the Directive is predicated upon some quite complex arrangements for the exchange of in-

271. Case C-323/97 *Commission* v *Belgium* [1998] ECR I-4281.

272. *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Citizens Residing in Third Countries*, Study for the European Parliament, Policy Department of Citizens' Rights and Constitutional Affairs, 2013, prepared by the EUDO Citizenship Observatory, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET%282013%29474441_EN.pdf, Table 1, at pp. 22-23 (EUDO FRACIT Report).

formation between the Member States to try to ensure that persons do not vote twice.

Member States must also, under both Directives, take the 'necessary measures' to ensure that EU citizens expressing the wish to vote are entered in the register sufficiently far in advance of polling day. The general tenor of the approach to registering to vote is that while this will require some action or expression of willingness in the first instance, those who have been registered once should stay registered until they cease to be entitled to vote. Those seeking to vote, or standing as candidates, are only required to produce the same documentation that nationals are required to produce, although they may be required to produce identity cards.

The EP Elections Directive allows the Member State of residence to require a Union voter to show that he has not been deprived of the right to vote in his Member State of origin. Both Directives allow Member States to prevent persons deprived of the right to stand as a candidate in their home State from standing as candidates. The 2013 amending Directive replaces the requirement to produce an attestation from the home State that the person wishing to stand as a candidate has not been deprived of his or her right to stand as a candidate with a simple statement to that effect submitted along with other paperwork, whilst at the same time placing additional onus on the Member States to cooperate and on the home State to provide the State of residence with information when requested. Austria can be cited as an example of early implementation of these very principles. Already in the 2009 European Parliament elections, the relevant Ministry contacted the authorities in the other Member States to obtain confirmation about the right to vote.

Widespread and effective compliance had not necessarily been assured, however, in time for the 2014 EP elections. It is noted in the Institutional Report that only half of the Member States had notified their transposition measures by the date of implementation (January 2014). In line with its general trend towards automatically beginning enforcement proceedings against Member States for failure to notify implementing measures, by February 2014 the Commission had already begun actions against all non-complying States.[273] But it is likely that these actions will be discontinued before they reach the Court of Justice , as Member States are pushed towards compliance by the Commission's actions.

273. See http://ec.europa.eu/eu_law/eulaw/decisions/dec_20140205.htm.

9.2./10.2. Key findings on transposition, application, and interpretation

National reports set out in detail the sometimes complex implementation arrangements for the relatively straightforward equal treatment rights first introduced by the Treaty of Maastricht and by the two Directives. The key to implementing these rights is to give resident EU citizens the right to vote in European Parliamentary and municipal elections in the host State *on the same basis as nationals*. In practice, unless there is some form of automatic registration of both nationals and EU citizens, this is quite hard to bring about, which is one reason why registration levels amongst EU citizens are much lower than for the citizens of the host State.

Challenges faced by EU citizens include not only difficulties in becoming and staying registered to vote, but also restrictions on membership of or the right to found political parties. For the broader context of EU electoral rights concerns political culture and not just individual rights to vote on the basis of residence. Political parties are important gateways for those wishing to be elected in the State of residence; and, moreover, it is important that political parties and political elites communicate the message to resident EU citizens that they are valued members of the electoral community for the purposes of these two types of elections where the right to participate is regulated at the EU level. In reality, as the Commission has acknowledged, awareness has gradually risen over the years.[274] But there are still not that many examples of good practice in relation to the provision of information. Moreover, it is well known that political party engagement with EU electoral rights has been patchy in many Member States (as has, indeed, been political party engagement with immigrant origin voters more generally).[275]

The latest data on local elections is contained in a 2012 Commission report on the implementation and application of Directive 94/80.[276] Turnout – discerned on the basis of levels of registration – continues to be generally ex-

274. This is demonstrated by the 2010 Flash Eurobarometer Report concentrating on voting rights, although in fact knowledge is not precise because many people think that resident ES citizens can vote in the national elections of the host State: see http://ec.europa.eu/public_opinion/flash/fl_292_sum_en.pdf.

275. For examples, see Shaw, *The Transformation of Citizenship*, at pp. 269-272. Useful, if now somewhat outdated, information about the political activism of immigrants can be found in the findings of the Politis Project, see http://www.politis-europe.uni-oldenburg.de/index.html.

276. Report on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, COM(2012) 99 final at para. 2.1.

tremely low (even in the context of general trends towards low turnout in local elections in many Member States). Generally, Member States do not collect data that make it possible to ascertain turnout levels by EU citizens specifically. The exceptions – where there seems to be greater activation of EU citizens towards registration (and therefore, it is assumed, towards voting) – tend to map onto those cases where EU citizen groups in the host State are dominated by one nationality.[277] Numbers of EU citizens running as candidates (and being elected) are also very low.

The evidence does not, therefore, indicate a high level of political integration of EU citizen countries into their host States.[278] The issue of registration becomes particularly urgent every five years with impending European Parliament elections, staggered over several days for May 2014. At that point, awareness arises of the fact that registration deadlines vary across the Member States, although with the increased use of the internet and social media for political information purposes (#EP2014 on twitter), there seems to be relatively little reason why EU citizens should struggle to find out what their deadline would be.[279]

While the Commission report on the 2009 European Parliament elections[280] emphasised that the number of EU citizens registering was rising in most Member States, it also highlighted that these were not rising in proportion to the increase in the numbers of resident EU citizens. In other words, free movement rights are being exercised, but EU citizens are not using the associated political rights. The Commission's Communication and Recommendation for 2014 emphasised the importance of connecting the national debates and campaigns (and the role of political parties) to European level debates and parties, and also of using the European Parliament electoral pro-

277. COM(2012) 99, at Section 2.3.

278. See further, the press release on the independent study on integration of mobile EU citizens in six cities, published on 11 February 2014, available at http://europa.eu/rapid/press-release_IP-14-137_en.htm.

279. A recent article in eu*observer* contains a list of all the deadlines highlighting the variation very clearly: see further, the report at http://euobserver.com/eu-elections/123291.

280. COM(2010) 605 final, Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC, at p. 5.

cess in order to assist in the identification of who the next Commission President will be.[281]

Yet overall, in formal terms, the implementation of electoral rights has been satisfactory. The Institutional Report sketches areas of action for the Commission, and we discuss these further in Section 9.3/10.3 below. It was interesting to see that only one case had to be brought before the Court of Justice in order to ensure basic formal compliance by all Member States (the local elections case brought against Belgium, noted above) despite the fact that electoral rights are so closely associated with the exercise of national sovereignty. These rights are not (any more) seen as major constitutional challenges to the Member States, even now during a period in the history of the European Union when EU 'immigration' (often not 'free movement') is seen by a number of States as a challenge to the domestic capacity to control the border.

This level of acceptance may be, in part, of course because the 'Europeanness' of European Parliamentary elections is on the whole gradually becoming better understood in the Member States, making it obvious to any observer that all EU citizens resident in the Member States should be able to vote whether in the home or the host State; and because – unfortunately – for the most part, local electoral rights are regarded as politically relatively unimportant. This point is re-emphasised by reference to the case of Luxembourg, which is the only State to hold a derogation based on the numbers of resident EU citizens being above a certain threshold. In that case, the Member State is permitted to set residence requirements which ensure that EU citizens wanting to exercise electoral rights (active and passive) must have been resident for a certain period of time.

In other words, the assumption has been, since the inception of the Directive, that where voting rights might in fact matter, because non-national EU citizens are a sufficiently large constituency to affect outcomes, they can be restricted by hard-to-satisfy residence requirements. We return to the issue of derogations in Section 9.5/10.5 below, when we consider the implicit claim in the Institutional Report that derogations have had their time.

Equally, there can be difficulties with determining the 'basic unit of local government' for the purposes of the Local Elections Directive. The fact that

281. Commission Communication, *Preparing for the 2014 European elections: further enhancing their democratic and efficient conduct*, COM(2013) 126 final; and Commission Recommendation on enhancing the democratic and efficient conduct of the elections to the European Parliament, C(2013) 1303. This is also reflected in the European Parliament's November 2012 resolution on the same topic (P7_TA (2012)0462).

in those federal States where there are 'city states' (i.e. Germany and Austria), the Member States do not allow voting in 'city state' elections but only in elections for very low level communal authorities (which have very few powers) continues to reinforce the marginality of these rights.

The national reports have also emphasised the almost complete absence of examples of individual citizens using the law to enforce their rights.[282] The only example of litigation given in the reports dates back to the 1995 local elections in Valencia, where two French residents excluded from the franchise successfully sought the annulment of an election and its re-running with them exercising their right to vote. In that sense, it would seem that these are EU rights that are generally accepted and properly applied by the Member State administrations, even if there is sometimes evidence of a lack of knowledge and training at the lower levels of administration.[283]

It is surely the case that, from time to time, EU citizens try but fail to obtain timely registration and thus the right to vote, or fall foul of a requirement to register on the roll. But while there has been, in some areas, an increased litigation culture in relation to electoral rights (one thinks of the case of prisoner voting rights in particular, especially in the two States where the right to vote is completely excluded, namely Estonia and the UK), litigation has obviously not been the chosen avenue of disappointed EU citizens seeking to vote in local or European Parliamentary elections in their State of residence. Moreover, as we shall see in the next Section, the Commission approach to enforcement and to the task of addressing actual or potential infringements has primarily been through the use of dialogues with Member States, involving very limited public statements about non-compliance in the context of periodic reports. This has been judged, one must assume, to have been thought to be the most effective way of improving the level of compliance overall.

9.3./10.3. Areas for Commission action

Details of the areas where implementation and application of the electoral rights Directives may be thought to be lacking can be gleaned from the Insti-

282. The Reports for Estonia, France, and Poland highlight meta level 'constitutional' challenges testing out the 'fit' between the electoral rights and the national constitutions.

283. See the complaints-based evidence presented in European Commission, *EU Citizenship Report 2013-EU citizens: your rights, your future*, COM(2013) 269 final at p. 17.

tutional Report, read in conjunction with the Commission's previously published reports focusing on the implementation of the two Directives. They pertain in particular to the additional requirements that Member States may impose on EU voters.

Three particular areas of concern can be picked out for brief comment. The first is the possibility in the Directives for Member States to require EU citizens to prove their identity in order to exercise the right to vote. It was only in 2012 that the Maltese authorities, for example, amended their national provisions to remove the obligation on EU citizens to show a *Maltese* identity card in order to prove identity.

The second concerns the residence issues that emerge in some Member States, especially in central and eastern Europe, which make it hard for EU citizens who do not go through a relatively heavy and bureaucratic residence registration process at the local level (which would not necessarily be strictly required for the EU citizen still to be resident lawfully in the territory) to become registered to vote. The report for the Czech Republic (echoing also the FRACIT Report for the same State[284]) notes the requirement of 'permanent residence'. Only 40% of EU citizens resident in the Czech Republic have this form of 'permanent residence'.

In like manner, there appears to be a similar restriction in Estonia; and in Bulgaria, where the Commission has indeed taken action. However, the cases concerned with the requirement of 'durable or permanent residence in Bulgaria' referred to in the report for Bulgaria were closed in September 2013.[285] As the Commission notes in its 2012 report,[286] it is good practice to enrol citizens automatically in the register once they have expressed an initial wish to be registered.

The third area of concern relates to the right to found and to become a member of a political party. Perhaps one of the most notable examples of this – and an example of legislative responsiveness in the face of challenges in the national courts as well as questions being raised by the Commission – is that of Estonia, which amended its legislation to allow foreigners to participate in political parties in 2006. The reports for Greece and Spain also note that only citizens can found political parties. In the Institutional Report, the Commis-

284. P. Kandalec, *Access to Electoral Rights. Czech Republic*, EUDO Citizenship Observatory, FRACIT Report, June 2013, available at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=136-Chech-FRACIT.pdf.

285. See the record of Commission enforcement action decisions at http://ec.europa.eu/eu_law/eulaw/decisions/dec_20130926.htm.

286. COM(2012) 99, p. 13.

sion makes it clear that it regards restrictions on accessing political parties as important obstacles to the enjoyment of political participation rights.

9.4./10.4. Special problems and limitations

Article 1(2) of Directive 93/109 places clear limits on the EU level regulation of the right to vote in EP elections at present. It provides that:

> Nothing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside its electoral territory.

In similar terms, Article 1(2) of Directive 94/80 provides:

> Nothing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate either of its nationals who reside outside its territory or of third country nationals who reside in that State.

The absence of a savings clause for resident third country national voters was, of course, one of the focus points that have arisen regarding the character of EU electoral rights. In *Spain v UK*,[287] after the UK had sought to implement the human rights mandate arising from the earlier ECtHR *Matthews* case – according to which those EU citizens resident in Gibraltar must also be included in the franchise for European Parliament elections[288] – Spain suggested that the UK should not extend its normal inclusive franchise to Gibraltar and thus should not include Commonwealth citizens in the franchise for European Parliament elections. It sought, by various means, to encourage the Court of Justice to find that the franchise for EP elections should be a European franchise – i.e. covering EU citizens, wherever resident, but not non-EU citizens. In *Spain v UK*, the Court of Justice specifically recognised that allowing Commonwealth citizens the right to vote was one of the constitutional traditions of the UK, and confirmed that it was 'within the competence of each Member State in compliance with [Union] law' to define the persons entitled to vote and stand in EP elections.[289] We return in the discussion under Q12 to the implications of the Court's ruling on the scope of EU citizenship and the right to vote in *Spain v UK* and the related *Eman and Sevinger* case.

287. Case C-145/04 *Spain v UK* [2006] ECR I-7917.
288. *Matthews v United Kingdom* App no 24833/94 (1999).
289. *Spain* v *UK*, paras 78 and 79.

The EUDO FRACIT report shows that there remains uneven coverage amongst the Member States in respect of external voting in European Parliament elections – albeit an inclusive approach is more common than an exclusive one, and there have been a number of cases (e.g. Germany[290]) where States have become more inclusive in recent years on the voting rights of non-resident citizens more generally. The *Eman and Sevinger* case demonstrates that the general principle of non-discrimination is still relevant in the field of external voting, if Member States have established what might be described as an irrational scheme.[291] In that case, problems arose because, normally, Netherlands citizens may vote abroad in European Parliament elections, but not if they reside in or have moved to Aruba, which is an island territory that is part of the broader Kingdom of the Netherlands, but subject to specific self-governing arrangements. The Court of Justice concluded that there was a difficulty with the scheme applied by the Dutch state, because it failed to treat groups of similarly situated Dutch citizens (i.e. those not residing in 'mainland' Netherlands) in the same way, but distinguished between those residing in another part of the Kingdom and those residing outside the Kingdom altogether.

The report for Denmark, building also on the FRACIT Report on Denmark, suggests that Denmark may have a similar problem. Here, the comparison is as regards the external voting rights of those Danish citizens moving to the Faroe Islands and Greenland (both self-governing territories within the Kingdom of Denmark but outside the EU) when compared with the situation of Danish citizens who move out of Denmark but intend to return within two years, who can vote as external voters.[292]

It is worth noting two other cases where the electoral arrangements for European Parliament elections are not wholly consolidated. The first case is Cyprus, where there are considerable difficulties around the participation of Turkish Cypriots – who are EU citizens – in EP elections. It has been announced that the Cyprus Government intends to ease their path to participa-

290. BVerfG, 2 BvC 1/11 from July 4 2012, available at http://www.bverfg.de/entschei dungen/ cs20120704_2bvc000111.html. See further, L. Pedroza, *Access to Electoral Rights. Germany,* FRACIT Report, June 2013, at p. 4, available at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=1313-Germany-FRACIT.pdf.

291. Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

292. Discussed in more detail in E. Ersbøll, *Access to Electoral Rights. Denmark*, FRACIT Report, June 2013, at p. 9, available at http://eudo-citizenship.eu/admin/?p=file &appl =countryProfiles&f=137-DK-FRACIT.pdf.

tion in the 2014 EP elections.[293] It is worth noting – since this is a group of citizens resident in a territory that is not controlled by the Greek Cypriot Government – that Cyprus is another Member State with restrictive rules on external voting.

Finally, to Croatia – a state with inclusive external voting arrangements, but an electoral register that continues to be marked by anomalies which arose as a result of the violent disintegration of Yugoslavia in the 1990s and the access to Croatian citizenship on the part of ethnic Croats (and indeed others) resident in Bosnia and Herzegovina. As the FRACIT Report on Croatia shows in detail, Croatia is now completing the process of consolidating its electoral framework including dealing with problems of an outdated and probably over-inclusive electoral register.[294]

9.5./10.5. Questions 9 and 10 – emerging issues and themes

The Institutional Report suggests that while the **derogations provided for in the Directives** are legally compatible with the Treaties, they 'seem at odds with the very objectives of EU citizenship and are likely to be eroded in the future'. There are two derogations currently in place allowing Member States to impose residence criteria and protecting national specificities: first, for Belgium, for local elections, responding to sensibilities around language (Article 12(2) of Directive 94/80); and, second, for those States with a resident non-national EU citizen population of voting age of more than 20% (i.e. in practice, just Luxembourg) in respect of both local and EP elections (Article 12 of Directive 94/80 and Article 14 of Directive 93/109). The Institutional Report notes, however, that Luxembourg has eased its residence requirements to make it easier for EU citizens to exercise their right to vote, whilst maintaining the essence of the derogation in place.

There are also restrictions that Member States are able to apply in Articles 5(3) and (4) in respect of certain posts or offices (e.g. elections for Mayor or Deputy Mayor), or roles where local elected representatives take part in the election or designation of members of national parliamentary assemblies.

293. 'Cabinet eases path for Turkish Cypriots to vote in euro elections', *CyprusMail*, 23 January 2014, available at http://cyprus-mail.com/2014/01/23/cabinet-eases-path-for-turkish-cypriots-to-vote-in-euro-elections/.

294. J. Sajfert, *Access to Electoral Rights. Croatia*, FRACIT Report, June 2013, available at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=135-Croatia-FRACIT.pdf.

These latter restrictions chime very much **with a continued respect in the scheme of EU electoral rights for the prerogatives of sovereignty and nationality in the Member States**, and here, too, the Institutional Report foresees a possibility that a deepening of the Union in a federalist direction – or indeed a separate cultural trend resulting from the intermingling of the Member State societies and peoples – could lead to the dropping away of these restrictions.

Aggregated data published in the Annual Report of the Fundamental Rights Agency for all Member States in 2012, drawing also on the Commission's own work in this area as well as on national reports,[295] indicated that of 27 Member States at that time, 14 have essentially no restrictions, and 11 have restrictions to a greater or lesser degree. Austria and Germany are not covered, as here the restrictions (which do exist) are applied at the state, not the federal, level. Croatia, which has joined the EU since that survey, does have restrictions. Thus it would seem that in this domain of EU electoral rights, **the Member States are more or less equally split between restrictions/no restrictions**.

The future of EU electoral rights is undoubtedly intimately connected to broader questions about **the future of European Parliament elections**. 2014 is seeing a **watershed of campaigning on social media** (e.g. #EP2014 on Twitter), allowing more widespread citizen engagement for those active online.

But even here the picture is mixed – the comments earlier in this Report about the potential to use citizens' concerns about the identity of the European Commission President as a trigger in relation to increased transnational campaigns for EP elections need to be offset by the **concerns raised by the judgment of the German Federal Constitutional Court in February 2014** to abolish a proposed 3% threshold for parties seeking election to the EP in Germany.[296] This ruling followed an earlier judgment declaring that a previous 5% threshold – still in force for national elections in Germany – was contrary to the constitutional guarantee of electoral equality. Some concerns have been raised in initial commentary about this (majority) judgment because the

295. Luxembourg: Publications Office of the EU, 2013; available from the FRA website at http://fra.europa.eu/en/press-release/2013/eu-agency-fundamental-rights-fra-presents-its-annual-report. See Chapter 7 on Participation of EU citizens in the Union's democratic functioning, especially Figure 7.1 on p. 215. This is a fuller dataset than we can derive from the national reports submitted to FIDE.

296. Judgment of the Federal Constitutional Court of 26 February 2014, summary available at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg14-014en.html.

Court expressed the view that there were no reasons related to the need for stability of the EP which would offset the argument that such a threshold creates – in a proportional system – electoral inequalities with respect to individual voter choices. This judgment **runs directly counter to the European Parliament's November 2012 resolution on the 2014 EP elections**, where it explicitly asked the Member States to introduce such thresholds in order to reinforce the stability of the Parliament, stemming from the fear of the increased representativeness of small and splinter parties.[297]

Discussion of the unsuccessful *LetMeVote* European Citizens' Initiative[298] is reserved until later in this Report, when we turn directly to issues of enfranchisement and disenfranchisement under Questions 11 and 12; but other **civil society initiatives have emerged in the run up to #EP2014** such as the campaign of *Europeans Abroad*[299] to help Europeans living outside the EU to find out if or how to exercise their vote in the EP elections (and to campaign for those States which do not grant external voting rights to do so).

Direct activation of citizens' concerns and social media responses to such activation may, in the longer term, be game changers for EU electoral rights. For example, recognising the complexities of national external voting rights provisions for EP elections – which may differ depending upon whether a citizen is resident in the EU (and thus may have the option to vote in the State of residence or the home State) or a third state – does not prevent the presentation online of exceptionally attractive visualisations that give EU citizens a first point of reference when considering their rights.[300]

Question 11

Briefly report on regional and other elections in which EU citizens residing in the country are granted electoral rights under national law. Is there a franchise for EU citizens that goes beyond the local and EP electoral

297. It should be noted that not all commentary is hostile to this approach; indeed, there are some arguing that, in the name of equality, the national parliamentary election threshold should be removed: S-C. Lenski, 'Wer hat Angst vor Franken und Rentnern? Wie Karlsruhe den europäischen Wähler stärkt', *Verfassungsblog*, 27 February 2014, available at http://www.verfassungsblog.de/de/wer-hat-angst-vor-franken-und-rentnern-wie-karlsruhe-den-europaeischen-waehler-staerkt/. The argument here is that the Court's approach strengthens the individual voter and their say in the outcome.
298. See http://www.letmevote.eu.
299. See http://www.europeansabroadvote2014.eu/.
300. See, for example, http://www.europeancitizensabroad.eu/can-you-vote.html.

rights required under EU law? What have been the reasons for extending such rights specifically to EU citizens?

Article 25 TFEU

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

11.1. Introduction

By definition, there is no formal EU law in existence that underpins this question. By asking the question, we were therefore looking specifically at where Member States go *beyond* EU law; and, in doing so, we also opened up the opportunity for more general speculation about the prospects for and desirability of such a development based on the dynamic nature of Article 25 TFEU.

Given the peculiarities of the UK's approach to EU electoral rights, which has seen the local electoral register on which EU citizens are included also used for a range of other elections and referendums, it is perhaps inevitable that the UK's experience could dominate the discussion of existing practices. This is all the more so because the UK has in place extensive electoral rights for Irish and (settled) Commonwealth citizens, predating EU law and EU citizenship and derived from the UK's imperial past and its continued relationships with those states. Since the 1980s, Ireland has reciprocated the UK position by allowing UK citizens resident in Ireland to vote for the Irish Lower House or *Dáil*. Perhaps most remarkable from the perspective of those observing the UK from a position of the constitutional exclusivity of the demos, EU citizens will be able to vote in the Scottish referendum on independence on 18 September 2014, just as they did in the referendum on devolution in 1997 and as they have done in every Scottish Parliament election since. It is interesting to note that the Scottish independence referendum franchise legislation includes an explicit reference to European Union citizens as voters.

This differs from previous arrangements, e.g. for Scottish Parliament elections, where, as noted in the report for the UK, EU citizens have been allowed to vote by default because the register on which they appeared (the local elections register) was the one used also for those elections (as it was for elections to assemblies in Wales and Northern Ireland too).

Beyond these instances, the national reports report on patchy extensions of the strict letter of EU law on local electoral rights. The report for the Czech Republic points out that EU citizens can vote in city commune elections in Prague even though, as well as being a commune and thus a basic local government unit, Prague is also considered to be on the same level as the other 13 Czech regions. The report for Denmark notes that EU citizens can also vote for five regional councils. Finally, some of the recent statutes of Autonomy in Spain provide for specific measures to promote the active participation of EU citizens in regional political life and in the political affairs of the autonomous communities, although this could not be extended to a right to vote unless Article 13 of the Spanish Constitution were amended.

In sum, there are few examples across the EU of Member States enfranchising citizens of other Member States to vote in national or regional elections, especially where the latter are elections for bodies that have legislative powers under the national constitutional settlement. On the contrary, to gain the right to vote in these elections – which many might regard as the gold standard of political participation in a state – EU citizens would need to naturalise as citizens of the host State, on the basis of accrued residence and after passing whatever citizenship tests the host State applies.

11.2. The possibilities for enfranchisement

The case for the broader enfranchisement of mobile EU citizens remains a consistent question within the framework of European integration, emerging regularly in Commission reports on EU citizenship. This concern is also reflected in public opinion and in complaints that come before the Commission.

Thus, in its 2013 Report on citizenship, the Commission highlighted public opinion findings on perceptions about electoral rights:

> In the 2012 public consultation on EU citizenship and in the 2013 Eurobarometer on electoral rights, 72% and 67 % of respondents respectively thought that non-national EU

citizens should be allowed to vote in the national elections of their host country. This represents a significant increase since 2010 (+17 percentage points).[301]

Similarly, in its 2010 Citizenship Report, the Commission noted the letters that it receives about the loss of the right to vote in any national elections, which some mobile EU citizens experience if their State does not give the right to vote to external voters (or curtails it after a certain period of time, as in the case of the UK).[302] It was this report that triggered the Commission's engagement with the area or enfranchisement and disenfranchisement, as the Commission committed itself to working with the Member States to try and eliminate such gaps in the coverage of suffrage that result from free movement. We return to the issue of *disenfranchisement* in the discussion under Q12.

Referring specifically to Article 25 TFEU, and including in the discussion both regional and national elections, the Commission in its 2013 Report committed itself to engage with the admittedly more difficult issue of *enfranchisement* in the future:

> In the context of the broader reflections on the shape of the future of the European Union, the Commission will examine ways to enable EU citizens to participate in national and regional elections in their country of residence.[303]

But any such endeavour would inevitably run up against the immediate problems of, for example, the constitutional entrenchment of the right to vote in national elections for citizens only in States such as Austria and Germany, which would be extremely hard to alter even if there were political will to grant such rights to vote. For example, in the report for Austria, it is noted there would probably need to be a referendum as this is a core principle of the Constitution.

The 2014 Commission Communication on disenfranchisement does address the alternatives to the *disenfranchisement* route that it adopts (in the initial form of a recommendation to the Member States) and dismisses all of them as less attractive.[304] It dismisses the idea of encouraging resident EU

301. European Commission, *EU Citizenship Report 2013 – EU citizens: your rights, your future*, COM(2013) 269 at p. 22 *et seq*.
302. European Commission, *On progress towards effective EU Citizenship 2007-2010*, COM(2010) 602.
303. *EU Citizenship Report 2013 – EU citizens: your rights, your future*, at p. 24.
304. Commission Communication, *Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement*, COM(2014) 33 at p. 8.

citizens to naturalise as contrary to the spirit of EU citizenship, and notes the possibility that EU citizens may have successive, shorter periods of residence in a variety of Member States where the naturalisation option would not be feasible. The Communication also dismisses a proposal, developed by one of the authors of this Report, to create an EU level framework convention as a 'laboratory of integration' within which Member States might proceed on the basis of reciprocity, as in the case of the UK and Ireland they already do.[305] This would lead, suggests the Commission, to a fragmentation of outcomes. It also accepts that political participation in the host State, while desirable, is very much a long-term option.

One reason is because of the complexity of the issues that it raises. These were fully canvassed in a EUDO Citizenship forum debate which generated a dialogue between a group of citizens proposing a European Citizens' Initiative seeking the enfranchisement of resident EU citizens in host country national elections (*LetMeVote*) and various academic and political/civil society interlocutors.[306] While the LetMeVote Citizens' Initiative was not ultimately successful in terms of the ECI framework, which requires one million signatures, it was certainly successful in raising the profile of the issues; and especially in highlighting the relationship between naturalisation, voting in the country of origin, and voting in the host country. Bauböck, in particular, has argued in favour of portable voting rights – the solution adopted by the Commission as its preferred first step and discussed at the end of the next Section (along with making national citizenship much more open to mobile EU citizens). For Bauböck, three reasons buttress the case for portable external voting rights. First, the idea can be linked to the core of EU citizenship, which is the right of free movement; second, it respects the principle that EU citizenship is derived from Member State nationality rather than from residence; and, third, it ensures that free movers will not lose their indirect representation in EU legislation through the vote of their national government in the Council.[307]

---

305. See Shaw, *The Transformation of Citizenship*, at pp. 206-208.
306. P. Cayala, C. Seth, and R. Bauböck (Eds), *Should EU Citizens Living in other Member States Vote there in National Elections?*, EUI RSCAS Working Paper 2012/32, available at http://cadmus.eui.eu/bitstream/handle/1814/22754/RSCAS_2012_32.pdf?sequence=1.
307. R. Bauböck, 'EU citizens should have voting rights in national elections, but in which country?', in Cayala, Seth and Bauböck (Eds), *Should EU Citizens Living in other Member States Vote there in National Elections*, at p. 4.

Meanwhile, as one of the authors of this Report argued in her contribution to the forum dialogue, the debate should not just focus on the Member States – which, after all, would be the entities required to instantiate any necessary legal and/or constitutional changes – but, rather, on the nature of the bonds of solidarity that exist (or do not (yet) exist) across the EU's common citizenship area.[308] For it is only if such bonds were in place that there would be a genuine political will to engage, on a transnational basis, with challenges faced by all Member States such as the financial crisis, youth unemployment and climate change.

We assess the treatment of EU citizenship at the national level more closely below, when we look at the responses to Question 13.

Question 12

Are there any specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise (e.g. in relation to the voting rights of persons convicted of criminal offences or persons with mental impairments)?

Article 10(2) TEU

Citizens are directly represented at Union level in the European Parliament.

Article 14(3) TEU

The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

Article 39(2) Charter of Fundamental Rights

Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

308. See J. Shaw, 'Testing the bonds of solidarity in Europe's common citizenship area', in Cayala, Seth and Bauböck (Eds), *Should EU Citizens Living in other Member States Vote there in National Elections*, at p. 8.

Article 1 of the Act on Direct Elections

The representatives in the Assembly of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.

Article 3 of Protocol No 1 to the ECHR: Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

12.1. Introduction – national rules on disenfranchisement

All states restrict the 'right to vote' in some way. All apply (minimum) age criteria and (some form of) citizenship criteria. Some apply residence criteria, a point we explore in Section 12.2 below. Many states also apply criteria based on mental capacity, and in relation to the deprivation of liberty or some form of probity criterion (e.g. disenfranchising prisoners or – as in many states of the US – disenfranchising those convicted of felonies for life).

The hypothesis explored in Question 12 was whether there was any traction in Article 39(2) of the Charter of Fundamental Rights.[309] According to the explanations attached to the Charter,[310] this is one of those rights that are mentioned in the Treaties and it applies under the conditions – and, as such, is subject to the limitations laid down – in the Treaties and under Article 52(2) of the Charter. Clearly, this provision must also be subject to Article 51(1) of the Charter – that is, it only applies to the Member States when they are implementing EU law. However, as to content, Article 39(2), according to the explanations, 'takes over the basic principles of the electoral system in a democratic State.'

We can find evidence of what these principles might be from Article 3 of Protocol No 1 to the ECHR. This provision, which was long neglected in the context of the development of the interpretation and application of the ECHR, is now understood to contain both passive and active elements, including the individual right to vote, but it is subject to implicit limitations, such as those

309. For fuller discussion of the implications of the Charter in relation to EU free movement, see the discussion under Q14 below.
310. Explanations relating to the Charter of Rights, [2007] OJ C303/02.

discussed above.[311] Two particular pinch points concern the disenfranchisement of persons deprived of their liberty following criminal proceedings and of those declared to have a mental impairment. In its case law, the ECtHR has repeatedly argued that the right to vote is not a privilege, and that the presumption in a democratic society must be in favour of inclusion.[312] In case law that has not been uncontested at the national level,[313] the ECtHR has concluded that the UK's blanket ban on prisoner voting (with the exception of prisoners held on remand) fell outside the margin of appreciation given to contracting states in the implementation of the rights contained in Article 3 of Protocol No 1 pursuant to the obligation to hold free and fair elections.[314] In similar terms, the same Court concluded that the Italian restrictions at issue in *Scoppola*, which entailed a lifetime ban from voting for someone convicted of murder and other serious offences, was not proportionate.[315] In *Kiss v Hungary,* the ECtHR concluded that there was a violation of Article 3 of Protocol No 1 in a blanket disenfranchisement of all those subject to a partial guardianship procedure, regardless of their particular mental capacities.[316]

A Resolution of the Parliamentary Assembly of the Council of Europe in 2012 included a call for the abolition of 'legal provisions providing for general, automatic and indiscriminate disenfranchisement of all serving prisoners irrespective of the nature or gravity of their offences'.[317] In 2011, the EU itself ratified the UN Convention on the Rights of Persons with Disabilities, the first time that the EU had become a party to an international human rights treaty.[318] The Convention is concerned with ensuring that disabled persons

311. For further discussion, see R. O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy' (2010) 61 NILQ 263.
312. *Hirst v UK (No 2)*, para. 59.
313. For a review of this case law, which is kept up to date and which has been prepared for the benefit of UK parliamentarians who have been dealing with this issue as a result of the fall out from ECHR case law (and the marked reluctance of the UK to comply with its ECHR obligations), see the House of Commons Library Standard Note, *Prisoners' Voting Rights – in brief*, SN/PC/06480, last updated 15 January 2014.
314. See *Hirst (No 2)* and also *Greens and M.T. v United Kingdom* App. 60041/08 and 60054/08 (2010).
315. *Scoppola v Italy (No 3)* App no 126/05 (2012).
316. *Kiss v Hungary* App no 38832/06 (2010).
317. See p. 217 of the FRA Report 2012: PACE Resolution 1897 (2012) *Ensuring greater democracy in elections* (available at http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19121&lang=en) at para. 8.1.2.
318. See 'EU ratifies UN Convention on disability rights', IP11/04, 5 January 2011, available at http://europa.eu/rapid/press-release_IP-11-4_en.htm.

enjoy their rights without restriction, including the right to vote.[319] The press release on ratification notes that ratifying *countries* have to make sure that disabled persons enjoy their right to vote, but it is clear that, with respect to European Parliament elections, this obligation may be hedged around in some respects by EU law obligations on those States as well.

The national reports (backed up where appropriate by data from the FRACIT reports) provide some important contextualisations of these provisions and reveal a wide variety of practice as regards different elections. For example, it is clear from the FRACIT report for Luxembourg that there is strict disenfranchisement of those subject to a guardianship order by a court.[320] The report for Ireland queries whether national arrangements fall below the bar set for individualised assessment in *Kiss*. In the report for Cyprus, we see that there is quite strict disenfranchisement for those deprived of liberty but also for those declared to be persons with mental impairment. Denmark disenfranchises those who have been declared legally incompetent. The Czech Republic only disenfranchises prisoners in local elections. Difficulties with obtaining an ID card in some cases for prisoners also represent a practical obstacle to voting. There appears to be a high level of restriction on voting rights for those who have been incapacitated according to the civil law, even though this has been criticised by the Constitutional Court.[321] Other States disenfranchise prisoners from candidacy rights, but not from the right to vote (e.g. Spain).

In some States, there have recently been moves towards enfranchisement. For example, Croatia has recently enfranchised mentally disabled persons. In 2008, the Netherlands withdrew a provision from the Constitution removing the right to vote from persons deemed legally incompetent by irrevocable court judgment.

Aside from the UK, to which we turn below, only one other Member State has had significant litigation on the issue of voting rights, in particular prisoner voting rights, and that is Estonia. The Estonian Supreme Court has found that Articles 39 and 40 of the Charter of Fundamental Rights only ap-

319. The Fundamental Rights Agency Report 2012 (available at http://fra.europa.eu/sites/default/files/annual-report-2012_en.pdf) has a comprehensive table (at p. 222) dividing the Member States between those that provide for exclusion, those that allow for limited participation, and those that provide for inclusion.

320. D. Scuto, *Access to Electoral Rights, Luxembourg,* EUDO Citizenship Observatory, FRACIT Report, p. 4.

321. P. Kandalec, *Access to Electoral Rights. Czech Republic*, EUDO Citizenship Observatory, FRACIT Report, p. 4.

ply to the rights of *non-national* EU citizens to participate in municipal and European Parliamentary elections under the same conditions as nationals. In other words, that court has not found a freestanding right in relation to universal suffrage – even in relation to European parliamentary elections, which are the European Union's 'own' elections. The Estonian rapporteur doubts, however, whether Article 39(2) can be so easily dismissed as regards its importation of universal suffrage principles into EU law for the purposes of regulating how Member States manage elections.

There are, of course, advantages to using EU law as the legal basis for contesting an exclusion from the franchise, compared to relying on ECHR law, as the UK example shows. The UK provides an illustration of a State where there may be no effective remedies for individuals arising at national level through the courts, just because the ECtHR has made a finding that the national legislature is not in compliance with the ECHR (as it has done in *Hirst*) and notwithstanding the fact that national courts themselves have made declarations of incompatibility between national law and the ECHR rights instantiated in the Human Rights Act 1998. However, so far, these declarations have not given rise to any individual remedies for prisoners (e.g. granting of the right to vote, or damages) who have argued that they have been deprived of their right to vote. The situation is aggravated by the refusal of the UK legislature to come into compliance with the ECHR, by introducing, for example, a differentiation that would allow perhaps some prisoners with short sentences to be excluded from the general ban on prisoner voting.

The question of whether EU law changes the situation – at least as regards the issue of voting in European Parliament elections – was canvassed in the UK cases of *Chester* and *McGeoch*.[322] It is clear that the EU law principles of direct effect and primacy could be of assistance in national challenges, in combination with the principle of effective remedies. For example, were a national court to conclude that a situation had arisen where a national law – in a case where the Member State was 'implementing' EU law – was contrary to a right contained in the Charter, then this should lead it to set aside the national law and apply EU law instead (in this case, 'the basic principles of the electoral system in a democratic State' as suggested in the Charter and thus, one assumes, ECtHR case law on Article 3 of Protocol No 1).

In fact, the UK Supreme Court found nothing in EU law that conferred an individual right to vote in the European Parliament elections on EU citizens,

322. *R (on the application of Chester) v Secretary of State for Justice; McGeoch (AP) v The Lord President of the Council and another (Scotland)* [2013] UKSC 63. For discussion in the report for the UK, see at fn.235 and following.

relying for its conclusions on the approach taken by the Court of Justice in *Eman and Sevinger*. The Supreme Court further doubted that the Strasbourg case law had been incorporated into EU law. It was certain that Articles 39 and 40 of the Charter were only concerned with the equal treatment right, that is, the right of EU citizens to vote in the State in which they are resident *if they are not citizens of that State*.

In considering the approach taken by the Supreme Court, the contestedness of the issue of prisoner voting, and notably of the stance taken by the judges of the ECtHR, needs to be taken into account. As what is needed in the UK to ensure compliance is a legislative scheme ensuring that some prisoners can vote, UK judges are anxious to defer in that respect to Parliament and not to take on the decision for themselves as to who might qualify and who might not. It should be noted, in that context, that both applicants in *Chester* and *McGeoch* were convicted of very serious crimes and were serving life sentences.[323]

It is clear that some confusion does appear to arise because of the juxtaposition of Article 39(2) of the Charter with the right in Article 39(1), which replicates the right of EU citizens to vote in European Parliament elections in the State in which they are resident provided for in Article 22(2) TFEU, discussed above in relation to Qs 9 and 10. Nonetheless, there is one interpretation of the judgment in *Eman and Sevinger* that does create the necessary connection to EU law in order to bring the Charter into play: namely, that the Member States are 'implementing' EU law because they are seeking to limit the process by which the European Parliament is elected 'by direct universal suffrage in a free and secret ballot', as set out in Article 14(3) TEU. This connection is akin to the proposition developed by the Court of Justice in *ERT*,[324] whereby Member States are, when seeking to rely upon an exception laid down in the Treaty (in that case, to a free movement right), bound by general principles of EU law, including fundamental rights – a line of case law that has now been taken up in relation to the applicability of the Charter in the review of national measures.

While the case of prisoners' voting rights is likely to run on inconclusively – at least in the UK – it is possible that there might be more scope for running a similar argument challenging national restrictions on EU citizens' right to vote in European Parliament elections on grounds of mental disability or impairment, when this is read in conjunction with the EU's explicit commitment

323. For further discussion, see A. Lansbergen, 'Prisoner disenfranchisement in the United Kingdom and the scope of EU law' (2014) ECLRev (forthcoming).
324. Case C-260/89 *ERT* [1991] ECR I-2925.

to the principle of non-discrimination on the grounds of (inter alia) disability, reflected in Article 21(1) of the Charter, and its ratification of the UN Convention on the Rights of Persons with Disabilities. The years to come may see such cases come before the Court of Justice, and indeed the issue has already been raised in Poland as regards access to the franchise for the 2014 EP elections.[325]

12.2. The Commission's disenfranchisement proposal

An unexpected offshoot of our Q12 emerged when the Commission issued a Communication in January 2014 recommending that Member States who currently do not grant voting rights to citizens who move outside their Member State but within the European Union should review their policies in the light of the principles of European citizenship and free movement.[326] As this was a new development, national reporters did not have the opportunity to respond to it and to assess its internal implications.

The Commission terms this a 'disenfranchisement' situation, although this presupposes that the default scenario is that a residence criterion for voting in elections is (no longer) a normal condition for the exercise of the franchise, especially in (national and European) parliamentary elections. Although the ECtHR has acknowledged that a good majority of ECHR contracting states do give such votes to their non-resident citizens (reflecting a wider international trend[327]), that Court has also confirmed that Article 3 of Protocol No 1 to the ECHR does not oblige contracting parties to take steps to make it pos-

325. See A. Bodnar, 'European Parliament elections without legally incapacitated persons: Trouble ahead for Poland',*Verfassungsblog*, 9 March 2014, http://www.verfassungsblog.de/en/wahlrechtsausschluss-fuer-entmuendigte-auf-polen-kommt-aerger-zu/#.UyGm_17eP0s.

326. Commission Communication, *Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement*, COM(2014) 33 final, 29 January 2014; Commission Recommendation of January 29 2014, A*ddressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement*, C(2014) 391.

327. IDEA and IFE, *Voting from Abroad. The international IDEA handbook*, Stockholm and Mexico City, International Institute for Democracy and Electoral Assistance and Instituto Federal Electoral de Mexico, 2007. Extended data on EU Member States and selected third countries is also available in the EUDO FRACIT Report, distinguishing between different elections (local, regional, national, European, executive, referendums, etc.).

sible for expatriate citizens to vote in parliamentary elections,[328] and that it is legitimate for states to distinguish between resident and non-resident citizens on the grounds of their respective connection with the home polity.[329] Most recently, in the *Shindler* case,[330] it also upheld the UK's 15-year rule for non-resident voters, limiting external voting to 15 years after the last date on which a person was registered to vote at an address in the UK; this rule has also survived a challenge in the national courts in the light of EU law.[331]

The key to the Commission's argument – and its recommendation for change by certain Member States – is that it poses the problem as one where disenfranchisement arises by virtue of the exercise of free movement rights under the EU Treaties. Mobile EU citizens are quite likely to lose voting rights in national (and often regional) elections because of a combination of the following factors: (1) some States do not allow external voting (or limit it to a considerable degree); (2) very few States allow non-citizens to vote in such elections on the basis of residence; and (3) there are few incentives for EU citizens to naturalise in the host State. In relation to the latter point, all the usual issues regarding naturalisation will arise with a national of a Member State who resides in another Member State. That is, she or he must balance the benefits of naturalising against the restrictions imposed by either the host State or the State of origin (e.g. if either or both States do not allow dual citizenship) and the 'costs' (fees, tests, oaths of allegiance, etc) of naturalising. This point links back to the points made under Q1 about the blurred borderline between *equal* treatment and *special* treatment.

In addition, and linking back to the discussion under Q6 in particular, the status of EU permanent residence, acquired after five years of legal residence, and the enhanced protections against deportation achieved after ten years of residence, narrow the 'distance' between the legal status of settled resident EU citizens and national citizens to an extent that is unusual even in the con-

328. *Sitaropoulos and Others v Greece (No 1)* App no 42202/07 (2010) (confirmed in *Sitaropoulos and Others v Greece (No 2)* App no 42202/07 (2012).

329. *Hilbe* v *Liechtenstein* App no 31981/96, 7 September 1999.

330. *Shindler* v *UK* App no 19840/09, 7 May 2013.

331. *R. (on the application of Preston)* v *Wandsworth LBC* [2012] EWCA Civ 1378, discussed in the report for the UK. The Court of Appeal rejected the possibility of the rule having a deterrent effect on those wishing to exercise their free movement rights. Another challenge that may emerge in the UK courts is one against the scope of the franchise that has been defined for the referendum on Scottish independence on 18 September 2014. An argument has been raised that the exclusion of those born in Scotland (or previously resident there) who are now resident elsewhere in the UK would be an infringement of their EU citizenship rights.

text of systems of regional integration.[332] And finally, it seems reasonable to argue that EU free movement is more often 'circular' or 'multipolar' than 'ordinary' international migration. Many mobile EU citizens intend to return to their home country or move to another Member State (or to a third country) after a period of time residing in the host State, and so have no intention of acquiring the citizenship of that State.

The Commission picks up a logic based on free movement and citizenship in its Communication that underpins the Recommendation. It argues that EU citizenship being *additional* to national citizenship should mean that 'one would not expect that the exercise of the rights attached to Union citizenship results in the loss of the right to vote in national elections, which is generally linked to national citizenship.'[333] Second, it points out that EU citizens may be affected in their behaviour in relation to free movement as a result of national disenfranchisement policies. Note that the Commission does not suggest that such policies may *dissuade* EU citizens from moving – the argument rejected as spurious in the UK court – but rather, that it might affect their practices, so that they may not declare their presence in an administrative process in order to protect their registration in the home State. To put it another way, they will not *formalise* their move in case this affects rights such as the right to vote in the home State, and the unstated assumption is that this may have other consequences at a later stage (perhaps in relation to the claiming of benefits – although benefits in the host State are not supposed to be dependent upon engaging in any specific bureaucratic process – or the acquisition of permanent residence). Finally, the Commission suggests that it is inconsistent with efforts to encourage citizen engagement with the political process to have gaps such as that caused by uneven disenfranchisement policies.

The Communication and Recommendation only address, in effect, the five States that disenfranchise, or place restrictions on the franchise, i.e. Cyprus, Denmark, Ireland, Malta, and the UK. The Commission does not engage with

332. In fact, as the Institutional Report points out at fn. 5 (drawing on data at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Acquisition_of_citizenship_statistics), there are a number of Member States where citizens of other Member States rank among the top recipients of citizenship of the host State, suggesting that there is still some way to go before EU citizenship is perceived as a substitute for naturalization in all cases. The point made in the Institutional Report is as follows: '[l]ooking at top five nationalities which acquired nationality of a Member State in 2012, nationals of at least one other Member States feature in 14 Member States (Belgium, Czech Republic, Germany, Estonia, France, Italy, Cyprus, Luxembourg, Hungary, Malta, Slovenia, Slovakia, Finland and Sweden).'

333. COM(2014) 33, at p. 7.

the restriction on voting except by accessing the ballot 'in country' in relation to Greece (the ECtHR *Sitaropoulos* case). It is worth noting, when considering the options for change, that restrictions in Denmark are constitutionally grounded; the legislature there has already gone as far as it can without changing the Constitution.[334]

The Commission's Recommendation is not that Member States should simply reverse their existing policies. On the contrary, what it recommends is that those states that currently do not provide unrestricted external votes could draw on what it sees as best practice, evidenced by the good practice outlined in the report for Austria – where external voters have to renew their registration in the *Wählerevidenz* every ten years in order to demonstrate ongoing commitment to the voting in elections. So the Commission suggests only that Member States change the rules for citizens resident elsewhere in the EU who demonstrate a continuing interest in the politics of the home State by some form of proportional step such as periodic re-registration (which the Commission states should always be possible online).

In practice, distinguishing between external voters living elsewhere in the EU and those living in third countries may be a step too far for some States, so it is likely that if they felt pressured by the Commission's Recommendation – only a soft law measure, it must be noted – to change the national practice, they may make blanket changes for all external voters. In practice, it seems unlikely that we will see widespread changes to national law any time soon as a result of this Recommendation. But what it does is establish a benchmark that may have traction in the future, for example, if the Member States decide they want to add to the corpus of rights using Article 25 TFEU, and they may therefore bring political rights back to the table for discussion.

12.3. Political rights of EU citizens – emerging issues and themes

In sum, we should note that while the introduction of political rights for EU citizens in the Treaty of Maastricht was **intended to contribute a major element of the newly constitutionalised form of EU citizenship, in practice the exercise of these rights has often been a damp squib**, because of difficulties in exercising these rights for mobile EU citizens. That said, political rights continue to offer points of reference around which EU citizens may mobilise, especially but not only if they are resident in another EU Member State.

334. Ersbøll, *Access to Electoral Rights. Denmark*, FRACIT Report, at p. 2.

Questions have also been raised by **EU citizens resident in third countries**. In some states, the issue of whether Member States make provision for universal suffrage for European Parliament elections has become salient. The fact that EU citizens have political rights remains an important dimension of the (as yet incomplete) common citizenship area.

Culture(s) of citizenship

For this set of questions, our intention was to chart the emerging *cultures* of (Union) citizenship in three key respects:

(1) **The status of Union citizenship is constructed around the paradigm of individual *rights*; but immigration law more generally is traditionally grounded in an ethos of *permission*** – do national actors (administrative, legislative, and judicial) tend to apply that distinction *appropriately* in their application and interpretation of Union citizenship?
(2) To what extent has the culture of rights been **strengthened by the changed legal status of the Charter of Fundamental Rights**? Are rights-based arguments intensifying, in other words, since the Lisbon Treaty came into effect in 2009?
(3) What is **the general *tone* of the national debate, in the media and civil society** more broadly, on the status of or rights attached to Union citizenship?

Question 13

On the basis of your findings from the above questions, do you consider that the implementation of EU citizenship in your Member State is understood at the national level as part of a rights-based EU 'free movement' and 'constitutional' culture, or as an adjunct to national immigration systems based on 'permissions' to non-nationals to be present in the territory?

Article 9 TEU

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 20(2) TFEU

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties ...

Article 26(2) TFEU

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

Article 67 TFEU

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.[335]

...

13.1. Introduction

The objective of this question was to ask national rapporteurs to reflect back on the responses they had already given to previous questions, in order to try to discern what type of 'culture(s) of citizenship' they felt might be revealed by those answers as regards the 'fit' between EU law and immigration law. We were aware, on the basis of previous research on the UK in which both of this Report's authors were involved,[336] of the complexities involved in as-

335. This provision is drawn from Title V of Part Three of the TFEU. Neither the UK nor Ireland takes part in the adoption of measures under this Title, except under arrangements for 'opt in'. The provision is used here as the basis for a generalised observation about the differences in legal treatment between EU citizens and third country nationals.

336. J. Shaw, N. Miller and M. Fletcher, Getting to grips with EU citizenship: understanding the friction between UK immigration law and EU free movement law, (2013) Edinburgh Law School Citizenship Studies (available at http://www.frictionandoverlap.ed.ac.uk/) and J Shaw and N Miller, 'When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law' (2013) 38 ELRev 137.

sessing the fit between national immigration law and EU free movement law, and it was clearly beyond the scope of this exercise to undertake a wide-ranging assessment based on a scientific body of empirical evidence. In that earlier research, however, it was found that problems of 'friction' and 'misfit' between the systems existed at the edges of free movement law, and, in particular:

(a) As regards the first entry and residence stability of third country national family members;
(b) As regards the use of residence tests ('right to reside') in relation to access to certain social welfare benefits;
(c) As regards those who may be deemed not to benefit (any longer) from EU free movement rights, such as those who have committed crimes and may be subject to deportation proceedings or those who are not deemed to be (sufficiently) economically self-sufficient and thus who are said to be an unreasonable burden on the state; and
(d) As regards those in transitional or partial regimes of free movement or equal treatment, such as citizens of Member States that joined the EU after 2004 and Turkish citizens.

The research found that, in many of these situations, there was a mindset amongst decision-makers, especially those responsible for taking what are called in the UK EEA decision (i.e. decisions under the EEA Regulations, which implement Directive 2004/38) but also, in some cases, in parts of the judiciary responsible for hearing appeals against decisions, which reflected a failure to grasp the rights-based nature of EU free movement rights. There was also evidence that reasoning to be found in immigration law, where there is an onus on the applicant to demonstrate why they should be given leave to enter or leave to remain, also seeps into the field of free movement law. The negative findings of this research were replicated in further studies contained in the report for the UK, which identifies additional cases where, reflecting a trend that has arisen in different parts of this Report, the courts have been obliged to correct decisions taken by UK Border Agency officials – now the Visas and Immigration section of the Home Office, which continues to be tasked with applying EU free movement law – because they had erred in their understanding of EU law.

As the texts highlighted in the box above show, EU law itself draws a distinction between citizens and third country nationals. Under the TEU, citizenship now has a constitutional status in the EU; and under Article 20 TFEU, Union citizens have rights to free movement and equal treatment. Free

movement is, as Article 26 TFEU shows, fundamental to the very character of the EU, and the Union must pursue this as an objective. But according to Article 67 TFEU, third country nationals should be treated 'fairly', and the notion of the area of freedom, security and justice, within which EU immigration law is nested, rests on the proposition that freedom, justice, and security are things that should be protected and pursued primarily in the interests of the (EU) citizen.

In reality, as even a cursory familiarity with many national systems of immigration will show, such an ideal of fair treatment is not fully achieved at the national level in many cases. EU measures – e.g. on long term residence or family reunification for third country nationals – have had an impact in terms of levelling up at the national level in many States (although these are measures that Denmark, Ireland, and the UK opt out of) – but that immigration/free movement distinction is still clearly a central one within which EU law works, and indeed it remains fully visible within the political rhetoric of the Union and its institutions.

13.2. Key findings from the national reports

The prevailing view within the national reports is that there are often some elements in the national systems that involve EU free movement issues being treated as an adjunct to the national immigration systems.[337] In legal terms, this can be seen, for example, where Member States take a more restrictive approach to the treatment of registered partnerships, creating gaps in coverage;[338] or where the emphasis is placed more on repression and control than on rights.[339]

In Denmark, which takes a formalistic approach to the application of EU law, and where judges and administrators thus use the national legal framework and culture as a starting point, this generates a clear impression that national law is somehow being given priority. The example is given of expulsion decisions where cases are first decided by reference to the Aliens Act and its formal categories, and only afterwards is compliance with EU law checked. The Aliens Act is, moreover, very much aimed at the administration rather than the citizen, with a complex structure and non-transparent vocabulary. These points recur at several points in the discussions earlier in this Re-

337. See e.g. the reports for the Czech Republic, Hungary, and Malta.
338. See e.g. the report for Cyprus.
339. See e.g. the report for Italy.

port, but it is worth noting in particular that Denmark has a restrictive interpretation in place for important areas such as social benefits and family reunification, affecting both EU citizens' rights and also the rights of Denmark's own citizens who might be covered by the *Ruiz Zambrano* doctrine. It is possible that Denmark's culture is further buttressed by its isolationist character, noting the absence of references for a preliminary ruling from the Court of Justice with the exception of a case on student grants and loans.[340] It is interesting to note that the character of Danish exceptionalism, noted not only in the report for Denmark but also in other secondary literatures on the weaknesses in the implementation of Directive 2004/38 viewed from the political science perspective of adaptation and Europeanisation,[341] is reflected in the comparatively insular character of Danish citizenship law, as highlighted in the comparative analyses of European citizenship regimes carried out by Maarten Vink and Rainer Bauböck.[342]

Domestic legal culture is also emphasised as a factor in another Nordic state, Finland. Here, too, there is a dualist system and a positivist legal culture, which sees judges much preferring to interpret and apply national norms. Even so, that does not always mean that they are not aware of and respectful of EU law and the case law of the Court of Justice. A contrasting case, where the national rapporteur felt confident about the domestic 'constitutionalisation' of EU law was that of France. Here, the courts are felt to be ahead of the legislature in recognising the right of residence as one of the '*droits 'constitutionnels' français*' and in the introduction of an effective proportionality test in order to assess deportation measures where there may be family life issues at play. Even so, the report for France acknowledges some cases, notably the right to welfare benefits for jobseekers, where the national courts have failed to take the relevant Court of Justice case law into consideration.

There are some other counter examples visible in the national reports, such as the presumption of lawful residence by EU citizens that municipalities must apply in the Netherlands unless the IND (the Dutch national immigration authority) has decided otherwise.[343] Even in Sweden, however, where a

340. Case C-46/12 *LN*, judgment of 21 February 2013, discussed under Q5 above.
341. M Wind, 'The European 'rights revolution' and the (non) implementation of the citizenship directive in Denmark', in L Miles and A Wivel (Eds), *Denmark and the European Union*, (Routledge, 2013), pp. 159-174.
342. M. Vink and R. Bauböck, 'Citizenship configurations: Analysing the multiple purposes of citizenship regimes in Europe' (2013) 11 CEP 621-648.
343. See the report for the Netherlands, response to Q2.

generally positive balance sheet of implementation and application of EU free movement law and of the rights of EU citizens can be reported, with a high level of understanding of the issues within the administration,[344] problems can arise because the question of assessing whether an EU citizen's residence is lawful or not is one to be decided separately by each individual local authority, resulting in deviations in practice in the approaches taken.[345] Here, the need for a unified approach to EU citizenship runs up against the traditional Swedish respect for the autonomy and independence of local authorities and administrations.

Some cases suggest a bifurcation in approach, so that where EU citizens themselves are affected, a rights-based system prevails; but where the rights of EU citizens with respect to their third country national family members are at stake, the issues are more readily treated as an adjunct to the immigration system.[346] In Bulgaria a different preoccupation has emerged – not over immigration, but over emigration, and over controls placed on certain citizens who have been convicted of offences, preventing them from leaving the country.[347]

It is quite common for States to have an approach where, in principle, free movement is acknowledged as a cornerstone of membership of the EU; but, in practice, there is a high degree of hostility because it is assimilated in public discourse or the popular imagination to 'ordinary' migration. This is clearly the case in the UK, where the 2010-2015 Coalition Government has set itself a target of reducing net migration – into which it has included EU free movement – to less than 100,000 by the date of the 2015 general election. This is just one reason why so much of the press coverage in the UK, which will be discussed in more detail under Q15, is extremely hostile to EU free movement at the present time. In the UK, as in Ireland,[348] the language that dominates the debate at present is of 'EU migrant workers' and 'EU immigration – not mobile EU citizens. This language has become pervasive in the UK. A bifurcation of theoretical approval and practical resistance is also reported in Austria.

In Estonia, a different set of pressures is reported around the institution of citizenship. There, the Supreme Court emphasised in 2008 that citizenship by

344. See the report for Sweden at fn. 23.
345. See the report for Sweden at fn. 22.
346. See e.g. the reports for Bulgaria, and Slovenia.
347. See Section 6.2.1 above.
348. Report for Ireland, discussing the title of a report of the Oireachtas Joint Committee on European Affairs of 2006, noted at fn. 97.

naturalisation is not a fundamental right, but a privilege.[349] This context is set by a wider set of concerns within politics and society about the constitutional status of Estonia as a rather recently reconstituted independent state, and the position of the Russian minority therein, many of whom do not have Estonian citizenship. Set against that background, EU citizenship issues in fact provide a backdrop of a Western ideal for self-determination and independence, which is set – in the Estonian national imaginary – against the history of Soviet occupation and domination from the Second World War until the breakup of the Soviet Union. Tying EU citizenship to Estonian citizenship thus provides an important symbolic way of filling out national citizenship.

A similar 'move' can be seen in an even newer Member State, Croatia, which is the only State to report having a constitutional provision on EU citizenship effectively replicating Article 20 TFEU.[350] This provision helps to reinforce Croatia's European future as part of its accession story, suggesting a future that goes beyond an exclusively nationally-based story of belonging which emerged during and after the wars of the Yugoslav secession and which involved Croatia for several years during the 1990s. This 'top down' move is clearly aspirational in character, and can come into conflict with other definitions of what it means to be Croatian and European. For example, on the initiative of a conservative and religious 'pro-family' organisation, a referendum was held in Croatia in December 2013 on enshrining in the Constitution a definition of marriage as being between a man and a woman, 'goldplating' the existing legislative provision that already limits marriage in this way. The initiative occurred as a reaction to a government proposal to legalise same sex partnerships – a move that would have brought Croatia into the European mainstream more generally, since the majority of Member States now recognise some form of same sex union.[351] On a turnout of 38%, however, 66% of voters approved the constitutional amendment.

Historical factors also come into play in Greece, where the effect of Bulgaria and Romania acceding to the EU in 2007 has been to move two of the largest groups of immigrants resident in Greece (after Albanians) into a new and, of course, more favourable legal category. Despite the best efforts of the Greek Government to implement Directive 2004/38 effectively, this has not

349. Judgment No. 3-3-1-42-08 – discussed in more detail in the response to Q8 in the report for Estonia.

350. For further discussion, see T. Orsolic Dalessio, 'The constitutional provision on EU citizenship: the case of Croatia', 2012, *Citizenship in South East Europe*, available at http://www.citsee.eu/node/87.

351. For more details, see the discussion above at Section 1.2.1.

necessarily translated into an effective communication of a new rights-based approach to these groups of non-citizens resident in Greece.

But some national reports also show that, away from the field of free movement in its 'immigration' guise, there are good examples at national level of the culture of Union citizenship as a rights-based structure being fully embraced. A good example concerns the electoral rights given to EU citizens in the UK, which go well beyond the strict requirements of EU law.

13.3. The institutional reaction

As the Institutional Report notes, the baseline for the Commission, in particular, is the rigorous enforcement of EU law. There is plenty of evidence from regular reports, and from a number of enforcement actions that have been started against the Member States in respect of Directive 2004/38, that the Commission is well aware of the divergences that exist between the Directive and national laws. In the Commission's first report on the implementation of Directive 2004/38,[352] profound disappointment was expressed about the transposition effort:

> Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.

The Institutional Report comments that issues arise from 'a lack of understanding of national administrations of the fundamental difference between the subjective rights of EU citizens stemming directly from the Treaty, and the broad discretion national administrations traditionally have in the area of migration law relating to non-EU nationals.'[353]

The Commission, though, likes to use dialogue to solve cases. Not one single case on what might be termed the 'immigration'-related aspects of Directive 2004/38 initiated by the Commission against the Member States has yet to reach the Court of Justice.[354] Indeed, in the Institutional Report, the Commission notes that it does not believe that there is 'a generalized unwill-

352. Report from the Commission to the Council and the European Parliament on the application of Directive 2004/38/EC, COM(2008) 840 final, at p. 4.
353. Institutional Report, Section 5.1.
354. See Shaw and Miller, 'When Legal Worlds Collide', where details of actions initiated by the Commission are given at fn. 5.

ingness of front-line administrations or judiciaries in Member States to grant EU citizens' their rights. On the contrary, it believes – although it is not clear that this assertion is evidenced completely by the national data discussed in this Report – that Member States do make an effort to separate out the two issues in national implementing legislation, through separate laws/regulations or at least separate chapters within those measures.

Finally, it is interesting to note the comment in the Institutional Report that the separation between free movement law and immigration law is fully recognised in the manner in which the relevant fields of law are taught in universities. This is a question that merits closer examination before a firm conclusion can be reached. For example, in the report for Greece, it is specifically noted that the two topics *are* in fact dealt with side by side in university law schools.

13.4. Question 13 – emerging issues and themes

EU free movement law is under pressure from a number of sides.[355] While we will return to this issue in more detail when considering media coverage of free movement under Q15, and in our General Conclusions, it is important to note a number of emerging trends in this Section.

The report for Ireland highlights in some detail **how the language of immigration has entered the field of EU free movement**. It quotes a paradoxical comment from a previous Minister noting that 'it is difficult in EU law, for a Member State to *impede* the free movement of EU citizens' and expressing a desire that this '*privilege*' should not be abused. In similar vein, we can note a collaboration between the Dutch Minister of Social Affairs, Lodewijk Asscher and a British commentator, David Goodhart, arguing for limits to EU free movement – an approach which seems to be premised on the idea that abuses of free movement are rife and that a new 'code' (the 'code orange'[356]) is needed because of the excessive burden on the national systems of EU free movement.[357] The report for Spain notes a bifurcation between

355. For an excellent short review, see R. Barbulescu, 'EU freedom of movement is coming under increasing pressure in the UK and other European states', LSE EUROPP blog, 20 February 2014, available at http://bit.ly/1jI6XOG.

356. See the report for the Netherlands at note 87.

357. L. Asscher and D. Goodhart, 'Code Oranje voor vrij werknemersverkeer binnen EU' *De Volkskrant*, 17 August 2013 and 'So much migration puts Europe's dykes in danger of bursting', *The Independent*, 18 August 2013.

elite political or legal perceptions of EU free movement and its culture of (EU) citizenship, on the one hand, and a wider popular view that may be dominated by a sense that EU free movement is simply 'an artificial door opened to other EU nationals in order to avoid application of immigration law', on the other.

As the Commission has commented on many occasions, **fraud and abuse do represent limitations upon free movement law**.[358] But the Commission has also tried to call out Member States that seek to take adopt a lazy approach to these matters by claiming that abuse and fraud are rife, whilst being unable to prove this through robust evidence.[359] Even so, the UK, in particular, is constantly trying to test the limits of free movement law, most recently through a restriction that will subject all EU citizens on low incomes falling below £150 per week to an individual assessment in order to determine whether they have work that is 'genuine and effective'. If not, they will be denied the status of 'worker' and thus the in-work benefits that bring the UK's poverty wages in some sectors up to a living wage.[360] EU citizens are thus, arguably, discriminated against unfairly compared to British low paid workers, and they will also be vulnerable to removal.

As the Commission notes in the Institutional Report, the difference between the politicisation of EU free movement today and how it was treated in previous years concerns both **the nature and scope of the claims being made**. Strong claims are made by politicians, and even ministers, about the nature of free movement and free movers that are simply **not backed up by evidence**. A good example is to be found in a report in the *Financial Times*, a newspaper that deserves plaudits for its balanced and sober approach to reporting, but which does, sometimes, do precisely that, namely report a view but without contesting it. Thus in a report in February 2014 about the extent to which the numbers of EU citizens resident in the UK are balanced by UK citizens resident abroad, the following comment appears:

358. Commission Communication, *Free movement of EU citizens and their families: Five actions to make a difference*, COM(2013) 837, at pp. 7-8.

359. The Institutional Report refers at note 248 to note 43 of *Five actions to make a difference,* which charts Member State responses to requests from the Commission for evidence about the scale of abuse.

360. S. Peers, 'Is the UK's restriction on EU workers' access to benefits legal – and if not, should it be?', *EU Law Analysis*, 19 February 2014, available at http://eulawanalysis.blogspot.co.uk/2014/02/is-uks-restriction-on-eu-workers-access.html, and D Flynn, 'New rules threaten EU migrant workers with discrimination', *Migrants' Rights Network Blog*, 19 February 2014, available at http://www.migrantsrights.org.uk/blog/2014/02/new-dwp-rules-threaten-eu-migrant-workers-major-discrimination.

Mark Field, Conservative MP for the Cities of London and Westminster, said comparison was difficult. 'These [figures] are not like for like: Lots of Brits abroad are successful people living in second homes in Spain or France. Most Brits living abroad are not aggressive beggars or sleeping rough on the streets: just comparing headline figures doesn't tell the whole story.'[361]

We return to the issue of press coverage in more detail in our discussion of Q15.

Question 14

Has the binding effect of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty in 2009, played any role in how the rights of EU citizens are being interpreted by the national courts and/or tribunals?

14.1. Introduction

Article 6(1) TEU reflects a milestone constitutional step achieved through the ratification of the Lisbon Treaty:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Respect for fundamental rights was already a well-entrenched dimension of the case law on Union citizenship, primarily in the context of the right to respect for family life as a general principle of Union law.[362] And even before the Lisbon-driven amendments to Article 6 TEU, Recital 31 of the preamble to Directive 2004/38 made it clear that the measure 'respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union'.

But the binding effect now attributed to the Charter brings two important twists with it: first, the explicit depiction of certain citizenship rights as sub-

361. E. Rigby, 'EU migrants moving to UK balanced by Britons living abroad', *Financial Times*, 10 February 2014, available at http://www.ft.com/cms/s/0/5cd640f6-9025-11e3-a776-00144feab7de.html#axzz2vAcJoYV8.

362. See e.g. Case C-459/99 *MRAX* [2002] ECR I-6591.

stantive fundamental rights included in the Charter too;[363] and, second, the fact that the *limits* placed on the scope of the Charter receive binding primary law effect too. On the second point, Article 51(2) is particularly relevant: its statement that the Charter 'does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties' was expressly cited by the Court in *Dereci*, for example, a judgment in which the potentially expansionist effects of *Ruiz Zambrano* were deliberately, as we have seen, reined in.[364]

Noting the relatively short time frame between the ratification of the Lisbon Treaty and the completion of the national reports, we chose to place a question about the impact of the Charter in our discussion of the *cultures* of citizenship. Essentially, and drawing from the Institutional Report's depiction of the impact of the *Ruiz Zambrano* jurisprudence, we wanted to see if a similar 'stimulating effect' could be detected in national case law from this perspective – fundamental rights could previously have been raised in citizenship cases at national level already, but does the *particular* legal change concerning the Charter bring something new to the discourse?

14.2. The Charter and national case law

The dominant message in the majority of the responses received is that the legal status of the Charter since Lisbon has not (yet?) made any substantive impact in national case law.[365] In many of these reports, it is clear that this is purely because there have been no relevant cases; a persisting tendency to have first recourse to more *familiar* national or other international (mainly, the ECHR) instruments that protect fundamental rights is also apparent.[366]

Where the Charter is discussed in more detail, however, its potential significance for reinforcing the fundamental rights of Union citizens is expressly

363. See Articles 15(2) (freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State), 39 (right to vote and stand as a candidate in European Parliament elections), 40 (right to vote and stand as a candidate in municipal elections), 45 (right to move and reside), and 46 (diplomatic and consular protection in third countries) of the Charter.

364. *Dereci*, para. 71.

365. See the reports for Croatia, Cyprus, the Czech Republic, Denmark, Hungary, Italy, Malta, Poland, Slovenia, and Sweden. This point is also confirmed in the Institutional Report.

366. See e.g. the reports for Cyprus, France, Germany, and Ireland.

noted – in the reports for Austria, Greece, and Portugal, for example, on effective judicial protection and the administrative and procedural safeguards that form a critical dimension of citizenship rights. Similarly, we saw the potential relevance of the Charter to national restrictions placed on the voting rights conferred by Union citizenship in the discussion on Q12, especially in connection with restrictions on prisoners' voting rights and the voting rights of persons with a mental impairment.

The report for the UK presents perhaps the most palpable evidence of a 'stimulating Charter effect' at national level to date, noting that '[l]egal practitioners increasingly make reference to the Charter to support arguments concerning the interpretation of the rights of Union citizens before national courts'.

More generally, three thematic points link the responses given under Q14. First, some reports note that references to the Charter were already a typical feature of national case law on citizenship rights i.e. even *before* the legal change effected by Lisbon. For example, in the report for Estonia, it is noted that 'the Supreme Court was rather forward thinking in that it repeatedly made reference to the [Charter] before its entry into force as a binding instrument'. Similarly, it was confirmed in the report for Finland that the Charter 'has received judicial attention ... well before the entry into force of the Lisbon Treaty' – including case examples that demonstrate that the Charter was 'legally relevant'.[367]

Second, a parallel emphasis on the limits as well as the rights contained in the Charter can be seen.[368] For example, the report for Finland notes that relevant post-Lisbon national cases include 'explanations for why particular rights in the [Charter] are not an obstacle to the application of national law', mainly in cases on deportation and expulsion. A similar point is made in the report for the Netherlands.[369] The problems identified in this sphere of citizenship law in the discussion on Q6 demonstrate that the absence of reflection on the Charter may well be linked to the systemic harshness shaping these decisions that is evident across the EU Member States. Perhaps reflecting a similar theme, it is also noted in the report for the Netherlands that '[t]he binding effect of the Charter has played a role in how rights of EU national are being interpreted, although it rarely as led to a more favourable result for the claimant'.

367. See the report for Finland, with case examples in note 126.
368. See e.g. the report for Ireland, with case examples at notes 110-111.
369. See the report for the Netherlands, with case examples at note 91.

But the report for Finland does emphasise that national courts have engaged with the Court of Justice on the meaning and scope of various Charter rights through the preliminary rulings procedure.[370] The report thus reflects the balance inherent in the Charter itself in the statement that 'it is clear that some lower courts also have a clear appreciation of the significance of the Charter, and are prepared to refer questions that concern its outer limits'.

Third, a degree of confusion with respect to the respective relevance of national law, the Charter, and/or the ECHR was mentioned in the report for Bulgaria, where it is suggested that the Court's instruction in *Dereci* on this point – i.e. 'if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR'[371] – 'does not appear to have been fully understood' by the national courts.

However, the discussion in the reports for the Netherlands and the UK present an alternative picture on this issue, with a series of cases confirming that the Charter can only apply if the applicant's situation falls within the scope of Union law; following *Dereci* very closely, it has been emphasised that fundamental rights contained in the Charter do not *themselves* form part of the 'substance' of citizenship rights under the *Ruiz Zambrano* test.[372]

On the other hand, reflecting the ambition of *substantive* convergence conveyed by Article 52(2) and (3) of the Charter, it is noted in the report for Ireland that '[t]here is evidence that the courts, while acknowledging that these three sources are not identical in their obligations, will in practice consider claims invoking these various provisions as substantially equivalent'.[373]

370. See similarly on that point, the report for Germany.
371. *Dereci*, para. 72.
372. See the report for the Netherlands, with case examples outlined at note 88; and the report for the UK, with case examples outlined at notes 272-275 (where it is also noted, however, that 'national courts have also remarked that *Dereci* is not entirely clear on whether the separation of family members can ever trigger the [genuine enjoyment] test').
373. See the report for Ireland, with case examples outlined at notes 105-106.

14.3. Question 14 – emerging issues and themes

Perhaps somewhat surprisingly, any stimulating effect that *might* have been expected to be attributed to the Charter in terms of providing a route for new arguments at national level that are pinned to EU law and its powerful – and often speedy, compared to ECHR law – remedies is **not yet apparent in the specific field of citizenship rights**. Instead, national legal activity remains focused on the substantive development of citizenship rights per se, whether within or beyond the scope of Directive 2004/38. It is a little disquieting, however, to ponder the absence to date of a more concerted Charter-linked fundamental rights discourse in national case law.

Question 15

Please describe the extent to which issues connected to EU citizenship have been a salient issue in the national media and how this issue has been dealt with in the national media. Are there any particularly dominant themes within media reporting (e.g., expulsion; access to state benefits; derived rights for third country nationals)? How accurate is national reporting of EU citizenship issues? Can you detect evidence of the influence of the media on national public discourse?

15.1. Introduction

Recent years have witnessed an increase in attention directed towards EU citizenship, prompted in part by events such as the rulings of the Court of Justice on crucial citizenship issues. These cases include *Metock*, *Ruiz Zambrano*, *McCarthy, Dereci*, and *Rottmann*. But other factors have raised the salience of citizenship and free movement issues too, including the accession of Romania and Bulgaria to the EU, and the subsequent lifting of transitional restrictions in January 2014. Some useful reference points from recent citizenship history can be drawn from the European Commission's 2013 Communication on free movement.[374] Starting at around 1.6% of the total population at the end of 2004, the proportion of mobile EU citizens increased to 2.4% four years later and then more slowly (to 2.8% by the end of 2012), due to both

374. European Commission, *Free movement of EU citizens and their families: Five actions to make a difference*, COM(2013) 837 final, at p. 3.

the economic recession and the gradual reduction in the mobility potential from central and eastern Member States.

Of course, as both the percentages and the overall population numbers have increased (as there are more EU Member States in 2014 than in 2004), this has been a considerable increase overall, although it is still a very small percentage of the EU population. But because the exercise of free movement rights and patterns of mobility are not even across the EU, perceptions tend to be distorted. It is perceptions – as much as facts – which have driven other developments such as the letter sent in April 2013 by the Interior ministers of Austria, Germany, the Netherlands, and the UK to the Presidency of the Council of Ministers on the burdens imposed by free movement and on the purported abuse of the social welfare systems of some Member States by nationals of some other Member States.[375] It is also worth noting the various events and programmes associated with the designation of 2013 as the *European Year of Citizens*, which sought to increase the visibility of EU citizenship and of the rights associated with it – and, conversely, of the obstacles experienced by those seeking to exercise those rights.[376]

Responding to all these factors, we were interested to discover the manner and the frequency of the reporting of issues related to EU citizenship in the national media across the Union. We wanted to know which issues received particular attention, and we asked national rapporteurs to indicate their impressions of the general tone or tenor of those national debates. Our questions were rather broad, and did not mandate a specific methodology. Some authors approached the issue by using databases and by searching the internet; others focused on specific issues and provided narrative data about how these have been treated.[377]

It was interesting to observe from the national reports that despite its profile at the supranational level, Union citizenship as a general concept, and the full range of rights and liberties that it implies, does not appear to be a particularly salient issue for the national media of most of the Member States; or –

375. The letter received significant attention from the media and the European institutions, as discussed in Section 15.2 below. For the text of the letter, see: http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf.

376. For further details, see http://europa.eu/citizens-2013/en.

377. There are, of course, plenty of examples in political science research of more scientific approaches to the use of media discourse in order to assess the trajectory of European integration. One example is the work of Ulrike Liebert, e.g. U. Liebert, 'Introduction: Structuring Political Conflict about Europe: National Media in Transnational Discourse Analysis' (2007) 8 *Perspectives on European Politics and Society* 235.

if it is – it is in the guise of 'EU migration' and 'EU migrant workers', perceived as a *burden* not a *benefit* of EU membership. But very few of the national reports make reference to any sustained discussion of the idea or implications of EU citizenship at this general level.[378] On the other hand, there was a range of particular issues in which elements of EU citizenship were implicated; some common to a number of States, others indicative of more individualised concerns. As will be discussed in more detail below, the media tend to focus at present on the economic problems stemming from the Eurozone crisis. Where national media *do* cover matters relevant to Union citizenship, they usually focus on issues close to their own national (political, economic or cultural) interests or circumstances. Reporting is often inaccurate, sensationalist, and riddled with loaded terminology; and this is almost always correlated with a generally Euro-sceptic outlook or bias. There are, however, a number of exceptions to this across the Union, where the media have been used to educate and promote a better understanding of the genuine implications of EU citizenship for national political and economic systems.

15.2. Is EU citizenship a salient issue in the national media?

As reported by several national rapporteurs, EU citizenship issues in general seem to attract little media interest in the majority of Member States, with reporting usually focusing on topics that tend to draw more attention or are perceived to have a greater impact on the everyday lives of the general public – such as the EU economic and financial crisis, or political issues relevant to membership negotiations. The under-reporting of EU citizenship is often explained on the basis that the lack of interest in some States stems from the lower number of EU citizens living there (e.g. Greece, Bulgaria, and Hungary) or because of a generally Euro-sceptic approach driven by main political parties (e.g. Finland, and pre-accession Croatia) especially in the aftermath of the Eurozone crisis. Of course, these reasons tend to change over time: both with the constant and progressive transformation of the European Union, and also with the different developments taking place in each Member State. For example, the lack of interest in (and reporting of) EU citizenship issues in Greece was traditionally attributed to the absence of significant numbers of EU citizens living there; however, with the accession of Romania and Bulgaria, this explanation no longer seems applicable.

378. Significant exceptions include the reports for Croatia, Slovenia, and Sweden.

A small number of national reports provide concrete data on media reporting. In Finland, for example, the concept of EU citizenship figures in the mainstream media at least once a fortnight.[379] There are relatively frequent reports within the mainstream media on issues relevant to EU citizens also in Denmark, Sweden, and the UK although these are usually framed in terms of the general 'immigration' debate and tend to be characterised in predominantly negative terms (with the exception of Sweden). The significant outlier here appears to be Croatia, in which the mainstream media began reporting about EU citizenship and its benefits on a near daily basis, unpacking the rights and their meaning, and thus raising awareness of the relevant issues amongst the general public. This, it is thought, had a significant impact in terms of lowering the rate of Euro-scepticism apparent in the country prior to accession. Two further points are apparent from the reports in general: media coverage of EU citizenship issues increases during, first, election periods (both local and European Parliamentary); and, second, immediately following decisions in major cases by the Court of Justice.

15.3. The main issues addressed by the national media

One tendency observed throughout the reports is that, even though EU citizenship and related issues do not have much prominence in the mainstream media in general, each Member State seems to have one hot 'citizenship issue' that figures regularly in the media and political discourse. Some of these are shared and some are specific to individual States. The result is a media discourse on citizenship that is at once disaggregated and nationalised, leaving us with a fragmented picture overall.

As already noted in the analysis of other issues raised in the national reports, countries/governments tend to focus on issues 'close to their hearts' and thus the media reports more regularly and more intensely on these matters rather than on issues that might be equally relevant, but are not perceived as impacting upon the Member State in question in the same way or to the same extent. Some of these more particular issues will be mentioned briefly

379. The report for Finland notes that '[b]y submitting search words 'EU-citizen', 'Union citizen', 'Union citizenship', 'Union citizens' to the data archive (1994 to mid-2013) of the highest circulating Finnish daily newspaper (*Helsingin Sanomat*), some 200 results are returned. That is, on average the concept has been employed less than fortnightly. Some 30 'hits' were published on the opinions pages, focusing mainly on personal accounts or concerns on work, mobility, and family life'.

in the analysis below; however, there are certain topics common to several (or most) Member States that are regularly quoted by the media and thus deserving of special consideration.

15.3.1. Benefit tourism, social dumping, and poverty migration

A group of issues that prevails in the media discourses of the majority of Member States relates to benefit or welfare tourism, social dumping and poverty migration. The notion that these practices are common (and indeed more common than is actually the truth) is generated by the economic inequalities between the Member States, which apparently incentivise individuals to move in order to enjoy a better standard of living elsewhere, perhaps by benefiting from a more generous welfare state. In reality, of course, the figures show that the majority of EU citizens move for work or work-related reasons,[380] but the perception is otherwise as the quotation from Mark Field cited at the conclusion of the discussion on Q13 shows very well. Here, a line dividing the 'new' from the 'old' Member States is palpably clear, especially following the 2004 enlargement and, more currently, in connection with the lifting of transitional restrictions on Romanian and Bulgarian citizens in January 2014. In Denmark, for example, the issue of 'social tourism' has been on the media (and political) radar since before the 2004 enlargement,[381] directed at the 'distinction between 'us' and 'them' where EU-nationals – especially those from the Eastern European countries – are portrayed as people who mainly come to Denmark to benefit from its generous social system, such as family and employment benefits'.

Several reports noted that the letter to the Council Presidency referred to above, on the alleged abuse of welfare systems by Union citizens, caught the attention of quite a few national media organisations across the EU.[382] This group of countries feared ever-increasing and systematic levels of welfare tourism, and applied pressure on the Commission to adopt restrictive measures (in particular, with regard to the then forthcoming lifting of the restrictions on the free movement of workers from Romania and Bulgaria in January 2014). Denmark later associated itself with this initiative and the issue was subsequently reported on regularly in the Danish media. Despite – or

380. Data can to be found in COM(2013) 837 at p. 3 *et seq*.

381. In 2003, the Danish Government published a report on Danish social benefits (*'Danske sociale ydelser I lyset af udvidelsen af EU'*), which was heavily discussed in the media.

382. For examples, see the reports for Denmark, and the Netherlands.

perhaps because of – the lack of quantitative data provided by these Member States in support of their claims, and despite the evidence to the contrary set out in reports by the Commission[383] and other organisations,[384] the prospect of welfare tourism became an important issue in the national (e.g. Denmark) and international media by the end of 2013. The Commission reasoned that 'economically non-active EU mobile citizens account for a very small share of beneficiaries'.[385] Even though it recognised that 'there can be regional or local problems created by a large, sudden influx of people from other EU States into a particular geographical area',[386] it noted that these could be dealt with by different sets of measures[387] rather than by restricting the rights of EU citizens, such as free movement and access to benefits. Moreover, different national media emphasised different elements of the general social dumping problem e.g. 'health tourism' in Andalucía (where EU citizens undergo expensive health treatment free of charge for which they would have to pay in their respective home States), or access to state-funded education in the UK.

383. Immediately upon receipt of the letter, the Commission noted the lack of statistical evidence supporting the claims made, and requested clearer data (see http://www.euractiv.com/socialeurope/commission-gets-cold-feet-push-l-news-519366). It then published, in October 2013, a report it had commissioned into the issue, which provided evidence that challenged the idea that social tourism was, or was likely to become, a significant burden on Member States. See the final report submitted by ICF GHK in association with Milieu Ltd, *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, 2013.
384. See, for example, the OECD's International Migration Outlook 2013 (http://www.oecd.org/els/mig/imo2013.htm); Centre for Research and Analysis of Migration, Assessing the Fiscal Costs and Benefits of A8 Migration to the UK (http://www.cream migration.org/publ_uploads/CDP_18_09.pdf); and Centre for European Reform, Is Immigration a reason for Britain to Leave EU? (http://www.cer.org.uk/sites/default/files/publications/pb_imm_uk_27sept13.pdf)
385. According to Commission's report, 'they represent less than 1% of all such beneficiaries (of EU nationality) in six countries studied (Austria, Bulgaria, Estonia, Greece, Malta and Portugal) and between 1% and 5% in five other countries (Germany, Finland, France, The Netherlands and Sweden).' See again, *A fact finding analysis on the impact on the Member States' social security systems*, 2013.
386. László Andor, Commissioner for Employment, Social Affairs and Inclusion, see: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes
387. For example, by using the financial aid of European Social Fund.

The media (and political) discourse in Member States across the 'EU Channel' (central, eastern, and southern Europe), on the other hand, have tended to concern themselves mainly with the other side of the economic aspects of the free-movement coin. The Hungarian media, for instance, have not been particularly concerned with (and thus have not reported on) the social dumping or benefits abuse issues discussed above; here, the major issues featuring regularly in the media relate to the posting of workers and the brain-drain of (in particular, healthcare) professionals.

15.3.2. Criminality and expulsions

The criminality of foreigners, including EU citizens, is another significant subject of media reporting noted in the majority of national reports (in particular, Austria, Bulgaria, Denmark, France, Greece, Italy, the Netherlands, and the UK). This includes the debate on tighter border control measures imposed as a prevention mechanism and the very low threshold of criminal acts for which an EU citizen can be expelled (as discussed in detail earlier in relation to Q6). For example, the ruling of Court of Justice in *Commission v Netherlands*[388] triggered a debate on expulsion of EU citizens in the Netherlands, and, in particular, on 'the connection between criminal conviction and measure of expulsion'.

However, the topic most commonly reported on in terms of alleged criminality and EU citizenship is the situation of the Roma minority and, in particular, the expulsion of EU citizens of Roma origin. In France, this issue has featured regularly on television, in the written press, and on the internet; and the tone of such reporting is generally very negative, highlighting controversial issues that further adversely influence the general discourse on EU citizenship rights and thus perpetuate negative feelings towards certain EU countries as a whole (e.g. recently, towards Romania and Bulgaria, and previously towards Slovakia, the Czech Republic, and Hungary). As a result, the report for France concludes that public opinion is often significantly biased; for example, in a recent survey, '47% of French people considered Roma not to be the same as other European citizens'.[389] The expulsion of Union citizens of Roma origin from Italy was the subject of media reporting in several other Member States (mainly, Denmark, France, Italy, and the Netherlands). In the UK, the centre-right press has branded the Roma minority as 'bad migrants'

388. Case C-50/06 *Commission v Netherlands* [2007] ECR I-4383.
389. See the report for France at note 183, reporting *Sondage Newsring*, 2013.

and the press has been responsible for a negative campaign against Romanians (who are regularly conflated in the popular press with the Roma) by publishing articles under titles such as 'The Roma invasion of Paris ... next stop Britain'.[390]

It is interesting to observe how the media use examples from other countries in order to claim to present an 'objective' picture on a particular issue, often resulting in an outcome which is anything but objective. According to the Danish report, for example, the national media, in order to draw an 'objective' picture on the Roma minority, selects negative examples or problems involving Roma not only in Denmark but also in other Member States. Such negative perceptions and strategic reporting seem to 'fuel public indignation and thereby confirm all the stereotypes around the Roma people.' In contrast, and on a more positive note described in the report for Sweden, one of the major national newspapers – *Dagens Nyheter* – took great care to report objectively and fairly on this topic, considering the issue also from the Roma perspective. As the report for Sweden notes, the coverage explained 'the underlying ideas of the EU citizenship as well as travelling down to Romania to give the readers a broad understanding of the complexity of the EU-solidarity, free movement for persons and the economic incentives to travel to Sweden'.

15.3.3. Acquisition of EU citizenship

Finally, one of the most noteworthy and controversial political issues relevant to Union citizenship that has emerged in recent years concerns the acquisition of citizenship and, in particular, the controversial plans to sell Maltese citizenship and thus EU citizenship to wealthy third country nationals.[391] Not unique to Malta, this issue has also been reported in other States, albeit in a slightly different form. In Bulgaria, for example, the fact that third country nationals (from Macedonia, Moldova, Serbia, Albania, or Ukraine) can receive citizenship via a simplified fast-track procedure (due to various cultural and historic links) is increasingly suspected of being open to abuse in order to obtain Union citizenship, and is thus receiving an increasing amount of media and political attention. The situation is very similar in Spain, where the increased ease with which nationals of Latin American countries can acquire

390. See report for the UK at note 284, quoting *The Daily Telegraph,* 6 October 2013.
391. For more information on this issue, see the analysis under Q8 above.

Italian citizenship and thus Union citizenship prior to migrating for linguistic reasons to Spain has aroused parallel concerns.

15.3.4. Major cases before the Court of Justice

Another notable trend is for media (and political) interest in EU citizenship to increase dramatically whenever the Court of Justice hands down a significant judgment in the field. Many of these decisions are widely discussed, in particular in States that are directly affected by their conclusions. For example, the *LN* case on student workers in Denmark; the *Chen* case on the primary right of residence based on *ius soli* in Ireland (which led, indeed, to a referendum and ultimately constitutional change); or the *Solyom* case[392] on freedom of movement of State representatives in Hungary. Other rulings (such as *Ruiz Zambrano*, *Baumbast*, *Bidar*, *Dereci*, *Teixeira*,[393] *Metock* and *Rottmann*) affect the policies of the majority of Member States and tend to receive more media coverage across the Union – and more direct response from national courts or governments.

15.3.5. Issues particular to certain Member States

The effects, both economic (rising prices of properties and services) and social (integration, language, custom), generated by the residence of citizens from 'richer' EU countries in certain popular tourist regions of 'poorer' EU countries (such as Bulgaria) have been reported as subjects of significant public debate. Furthermore, in the report for Netherlands, for example, language requirements and integration courses for EU citizens were identified as part of national political debate (both driven by and reflected subsequently in the national media). In Greece, a major topic debated in recent years in the media concerned the poor living conditions of foreigners, which would improve significantly if they were given access to social and other State benefits (although, debates on this and other issues were quickly superseded by the onset of the national debt crisis in Greece).

Other topics more particular to the concerns of individual Member States (and thus reflected in their respective national media) are, for example, the verification of the transcripts of working qualifications (Croatia) and national rules or regulations discriminating against EU citizens (such as higher rates

392. Case C-364/10 *Hungary v Slovak Republic*, judgment of 16 October 2012.
393. Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107.

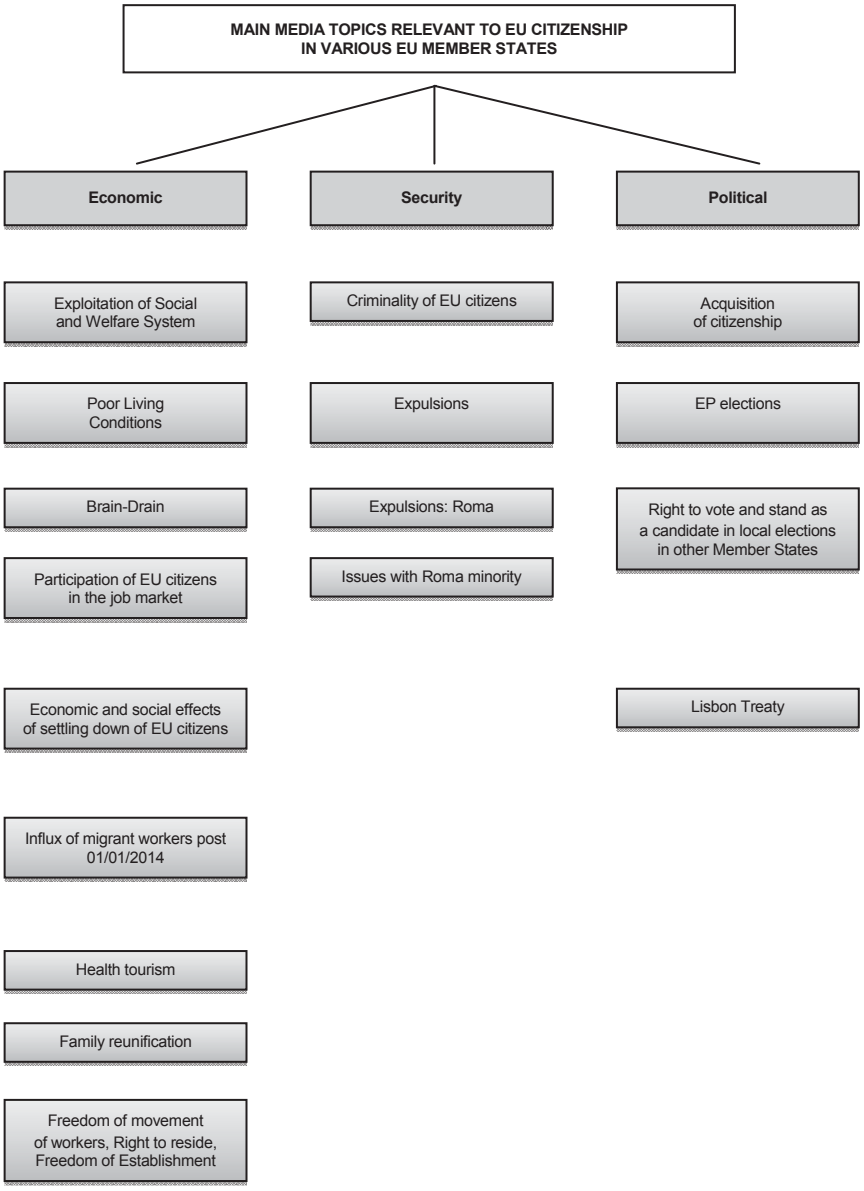
on bus fares or utility bills in Malta). Political issues relating to Union citizenship that can be identified from national reports include active and passive suffrage in local elections, the voting rights of EU citizens in other Member States (from both perspectives, e.g. Slovenian citizens abroad and EU citizens in Slovenia), elections to the European Parliament, and the adoption of the Lisbon Treaty. Below, we present a single figure that brings all of these issues together in a useful visualisation:

15.4. Tenor, accuracy, and influence of reporting

A significant number of the national reports criticise the media for using inaccurate terminology when referring to issues relevant to EU citizenship. This most probably stems from the fact that, in a majority of EU Member States, official government policy assimilates EU citizenship to general immigration issues to a greater or lesser degree. In that respect, the media are simply following and copying this trend and tend to use – instead of the legally correct EU citizenship-related concepts and terms – terms more familiar to their readers such as immigrants, migrants, foreigners, and non-nationals, on a daily basis and without differentiating between, for example, third country nationals and EU citizens.

In Ireland, for example, the terminology used by the media when reporting on any non-Irish nationals tends to be very general, adopting terms like 'immigration', 'immigrants', 'non-nationals', 'foreign-born population', or 'foreign nationals' without specifically distinguishing between EU citizens and third country nationals. A similar situation has been reported in Denmark, where the media, apart from not distinguishing between EU citizens and migrants from third countries, tend to refer to the former by their individual nationalities. Furthermore, many negative and sensationalist terms like 'loophole', 'influx', 'abuse', 'exploitation', 'social dumping', or 'foreign criminals' feature habitually in the rhetoric of media; and even terms like 'tourism' that usually have more positive connotations are often given a negative shading when used in conjunction with EU citizenship issues, such as 'benefits tourism', 'welfare tourism', 'health tourism', and so on.

An example of inaccuracy in media reporting observed in the report for the UK is the confusion between the concept of EU citizenship and the rights attached to it based on instruments adopted at the EU level, on the one hand, and the protection of fundamental human rights based on a different set of



norms, adopted at national, regional (ECHR) or international level (ICCPR): UK reporting is often misleading. For instance, there is still a tendency to conflate EU citizenship rights with the legal framework of rights protection

under the ECHR/Human Rights Act. The UK office of the European Commission publishes official clarifying responses to such instances of misreporting on EU issues on a near daily basis.[394]

There is often, of course, a close connection between the biases of particular media outlets and the accuracy of information or choice of terminology. Much of the tabloid press and some right-wing media tend to use shocking or sensationalist terminology in order to attract audiences and readers, often both driven by and contributing to the negative views of the general public on certain issues. On the other hand, there now exist an abundance of alternative media sources, such as online blogs or rights-focused internet portals that offer a far more balanced analysis of issues relevant to EU citizenship.[395] However, as noted also in the reports for Spain and the UK, these tend to attract a far more limited (and often specialised) audience. There are also fact-checking websites that test the accuracy of politicians' statements or press reports.[396]

On a positive note, there are countries (such as Finland, Slovenia, and Sweden) in which the general view of media reporting on citizenship issues is that it has been relatively accurate, with little bias, aiming at objectivity (i.e. based on factual data and in-depth research of circumstances[397]) and tending to include explanation of the key concepts on which the phenomenon of EU citizenship is based. In Sweden, for example, the media have tried to show objectively 'the tension that the Union citizenship might cause vis-à-vis the national welfare state' without employing overstated terminology in this regard. Similarly, in the UK, some media outlets have started to counter negative claims about the costs of EU migration to UK taxpayers, emphasising instead the rights-enhancing character of decisions such as *Metock*.[398]

---

394. See also, Shaw *et al*, *Getting to grips with EU citizenship*, at pp. 53-54 and pp. 29-30, and the European Commission Office for the UK blog at http://ec.europa.eu/unitedkingdom/blog/.
395. Examples include the Croatian internet portal 'Danas.hr', which has published a number of newspaper articles informing Croatian nationals on EU citizenship rights and explaining the fundamental terms and their meanings.
396. The first fact-checking website – based on crowd sourcing – which focused specifically on EU affairs was established in early 2014: https://factcheckeu.org/.
397. See, for example, the above mentioned example of Swedish newspaper *Dagens Nyheter*, which published a detailed report on situation of Romanian beggars of Roma origin in Stockholm. The report was based on extensive research into the situation of Roma in Romania and the explanation of related concepts such as free movement of persons, EU solidarity, and the economic incentives for travel to Sweden.
398. See the reports by the *Guardian*, 6 March 2013, available at http://www.theguardian.com/commentisfree/2013/mar/06/uk-benefits-eu-migrants-what-crisis, or the BBC, 25 July 2008, at http://news.bbc.co.uk/1/hi/7525472.stm.

It would be interesting to test whether there is a correlation between the accuracy of the data used by the media and the nature of media rhetoric relevant to EU citizenship. Is it the case, for example, that inaccurate data goes hand in hand with negative reporting? Or is the pro-European media just as likely to rely on incorrect factual claims in the pursuit of their editorial agendas? Further research would be required on this issue as the national reports do not contain enough detail to enable any firm conclusions to be drawn across all Member States. This being said, there does appear to be a correlation (observed among the reports that did provide data on the accuracy of reporting and the type of rhetoric used) between the use of inaccurate data and negatively loaded terminology. These tactics are most often employed in the context of media reports seeking to undermine the legitimacy or desirability of EU citizenship and its related rights and freedoms.[399] On the other hand, the few reports that did not find that the media generally resorted to abusive, sensationalist, or negative terminology highlighted that media reporting on EU citizenship was accurate, positive, rights-centred, and focused on technical issues.[400] However, as noted above, much more detailed research is required before any robust or confident conclusions of this sort can be reached.

As most of the national reports conclude, the influence of the media on public opinion in relation to Union citizenship issues cannot readily be denied. Several examples illustrate this phenomenon. In France, the angle of reporting employed by some sectors of the media – by emphasising only the controversial issues attached to the concept of Union citizenship – seem to have an influence on the tone of public debate with regard to the balancing of national interests with EU citizenship rights. Furthermore, as presented in the report for the UK, the media rarely report on the economically active and therefore self-sufficient EU citizens that live and work there. Moreover, even if this does occur, the reporting generally ignores the contribution of these citizens to the national economy, instead playing up the perceived negatives of even these migrants, such as noting the contribution of EU citizens 'to an overall increase in demand for the UK public services' (such as primary school places).[401]

In Ireland, media coverage of the 2004 citizenship referendum (which was related to the *Chen* judgment) and the subsequent constitutional amendment

399. As observed in the reports for Denmark, Ireland, the Netherlands, Spain, and the UK.
400. See e.g. the reports for Croatia, Finland, Slovenia, and Sweden.
401. See BBC News Online, 15 March 2013: *Urgent need for 250,000 school places, spending watchdog warns Daily Mail*; 1 September 2013: *EU influx leaves 3,000 children without primary places for the new term*.

presented a mixed picture: '[w]hile editorial treatment (and opinion pieces) was balanced, the dissemination of unanalysed and unchallenged quotations of politicians, mainly in favour of the referendum, led to a flawed, prejudiced and inadequate debate on the issue. 'Loophole' became part of the normalized vocabulary... 'Loophole' and ''abuse of Irish citizenship' were used in tandem.'[402]

15.5. Good practices in media reporting

There are also several examples of good practices evidenced across the reports. For example, some national media outlets have taken upon themselves the role of 'educator' and have been viewed as actively participating in the general education of the public on the issues relevant to EU citizenship. This has involved various educational campaigns, involving explanatory articles on citizenship rights and the provision of information on the topics that are closest to the interests of the population (although it is clear that the media do not merely react to public interests, but also to a significant degree shape them). Topics covered include the free movement of workers, the right of establishment, the recognition of working qualifications, and voting rights in other Member States. These initiatives can provide the general public with an incentive to travel, to work in other Member States, or simply to take an interest in European political life and discourse.

This theme is, as expected, more apparent in the newer Member States, and in particular in Croatia, Estonia, and Slovenia. In the Estonian media, for example, attention was paid to the participation of EU citizens in the municipal elections in October 2013 (which resulted in the successful election of a UK citizen of African descent). This was portrayed by the media as 'a positive step towards expanding Estonian society, providing recent immigrants with a voice in politics and making the Estonian capital of Tallinn a more cosmopolitan city.' Various initiatives developed in Croatia further illustrate this trend, such as public information campaigns on the citizenship rights; the 'Education for Democratic Citizenship and Human Rights' programme estab-

402. See M. Breen, A. Haynes and E. Devereux, *Citizens, Loopholes and Maternity Tourists: Irish Print Media of the 2004 Citizenship Referendum*, available at http://dspace.mic.ul.ie/bitstream/10395/1300/2/Breen,%20M.J.,%20Haynes,%20A.%20and%20Devereux,%20E.%20(2006),'Citizens,%20Loopholes%20and%20Maternity%20Tourists%3A%20Irish%20Print%20Media%20Framing%20of%20the%202004%20Citizenship%20Referendum'.(Book%20Chapter).pdf.

lished by Platform 112, which included a curriculum for civic education and a number of national programmes on the implementation of European standards on human rights and democratic citizenship;[403] and the production of a 'TV programme called 'EU-classroom' which gathers experts from certain related institutions discussing and analysing the rights emerging from EU citizenship.'

Similarly, in Slovenia, during 2013 – the European Year of Citizens – a range of newspaper articles were published with titles such as 'EU citizenship offers a lot. Take advantage of it'. The media were reported as providing accurate information on various rights stemming from EU citizenship, including on voting rights, especially in connection with the upcoming elections to EP in 2014 – e.g. an online application MyVote2014 – to promote the elections and raise awareness among EU citizens.

15.6. Question 15 – emerging issues and themes

The concept of **EU citizenship is not, at a general level at least, viewed as being of particular importance by the national media across the majority of Member States**. Legal aspects, including the rights attached to Union citizenship, receive for the most part little attention in the media – although there are exceptions. Where attention is paid to the implications of EU citizenship, the analysis tends to focus on the free movement of workers or voting rights (e.g. European Parliamentary elections). Quite often, the emphasis within press reports or analysis is on **challenging the legitimacy of these rights rather than the clarifying how they may benefit the public at large**.

As emerges from a range of reports, the opinions presented by media and the politicians, and their subsequent influence on public opinion, are intricately interlinked, feeding dynamically off each other. Right-wing political parties, in particular, appear to use press campaigns and supportive media outlets in order to create a negative image of EU migrants. This one-sided analysis coupled with negative terminology and inaccurate (or indeed, simply absent) supporting data together have a **powerful influence in shaping public discourse and political agendas**, which then feed back into the political system in terms of popular support for placing restrictions on EU citizenship rights and freedoms and a generally Euro-sceptic outlook, both at the national and

403. See http://gong.hr/en/active-citizens/platform-112/.

the EU levels. In all of this, the media seem to be a powerful ally and often a tool in the hands of politicians.

Finally, like so much else in the current climate, discussions of EU citizenship in the media have been **overshadowed of late by the current economic crisis within the EU**, so that even where citizenship issues are raised, this tends to be filtered through the lens of their impact on or in relation to the crisis. This creates a climate of uncertainty, anxiety even, so that when citizenship issues do come to the fore for whatever reason, whether on the front pages of newspapers or on television, reporting is often negative, sensationalist and inaccurate – and, not infrequently, outright politically biased.

General conclusions

It would be hard to sum up the conclusions to be drawn just from this lengthy General Report, never mind the rich Institutional Report, for which we were very grateful, and the many excellent national reports. In lieu of a single conclusion, what we offer in this final section are some short reflections about where we think the particular pressure points might lie both now and in the future. Our conclusions are more in the way of questions than concluding – and closing off – statements. We intend, in other words, to open the dialogue rather than to close it.

Overall, we found a complex ecology of Union citizenship of densely consisting enmeshed national/Union, as well as legislative/administrative/judicial practices and synergies. Union citizenship *is* a shared EU/Member State competence and it is an 'additional' status vis-à-vis Member State nationality. But the comparative work that this project has enabled suggests that while an awareness of the significance of national context and difference is already visible just from a review of the EU Treaty, the legislative framework, and the case law of the Court of Justice (i.e. the usual materials of the EU law scholar), what we need in reality is a much more *decentralised and differentiated understanding of the application and implementation of Union citizenship* in order to gain a fuller picture.

In that light, the extent to which an immigration or permission-based culture has been superseded by a more 'centralised' sense of citizenship, as a status based on supranational rights, is lower than we might have thought would be the case. We also saw a significant range of regulatory and practice-based diversity. Such variation is sometimes provided for expressly at EU level, recalling, for example, the scope attributed to national legislatures to

determine what practices will be applied with respect to the implementation of Article 3(2) of Directive 2004/38.

However, we also suggested that the allocation of national discretion – both understandable and valuable in several respects – can potentially lead to the compromising of equal treatment for certain Union citizens and their family members. The Institutional Report emphasises that the existence of free movement rights per se and the mere possibility of exercising them are just as critical as the extent to which they have actually been exercised, raising questions about the responsibility of the EU institutions to pioneer substantive change – without waiting for the impetus of individual complaints or litigation. The achievements of EU law in the combating of nationality discrimination have been remarkable. But perhaps tackling discrimination *beyond* nationality is a new frontier?

In a related sense, we also uncovered a transposition, application, and interpretation picture that features *multiple pockets of diverse practices or points of concern*, a fragmented picture that then raises *a different order of enforcement challenge* than outright systemic transposition failure. It is important to realise that accurate transposition does not, in and of itself, guard against problems with the *application* of either EU level or national level measures. The discussion on expulsion provided a stark exposition of this point, and we suggested that the work of the legislatures, at EU and national levels, clearly should not end with adoption/transposition of Directive 2004/38. When principles develop predominantly through case law, and especially where they develop rapidly through that medium, we saw a range of related challenges for national authorities, and for national courts and tribunals in particular. Perhaps the emerging consensus between the European Parliament and the Council of Ministers on a draft directive (COM(2013) 236)) containing new enforcement mechanisms for some aspects of the free movement of workers, including the setting up of bodies to promote those free movement rights offers some hope for a more positive future at least in that restricted field.

We also wish to emphasise a nascent but, we believe, increasingly significant issue that cuts across so many parts of this Report – i.e. the construction of narratives about 'good' and 'bad' citizens: whether in the context of otherness generally, or of economic self-sufficiency particularly; in the context of criminal behaviour, which can be 'punished' by expulsion or through the withholding of deeper citizenship connections such as permanent residence; and through political debates on and media reporting of EU issues. We are interested primarily here in trying to understand how the dynamics of these narratives flow backwards and forwards from the Member States to the EU

level – and vice versa – especially where Member State messages are clearly conservative and *rights-narrowing*.

This phenomenon raises a broader question too: if we accept (and the Treaty does) that Member States control the *acquisition* of Union citizenship through their competence to grant nationality (subject only to a potentially limited review against general principles of EU law), to what extent do – and to what extent *should* – the Member States also control the *broader culture* that shapes the exercise of this supranational status? And what does this tell us about the extent to which Union citizenship really has become a 'fundamental' rights-based status rather than an *increasingly conditional privilege*?

We sought to enter this research process with a minimum of preconceptions about the evolution of Union citizenship right across the EU and its Member States. We knew quite a lot about our own national cases and about developments at the EU level (especially the complex twists and turns of some of the recent case law of the Court of Justice), but there was much that we knew we stood to learn from the national reports. And indeed, this has proved to be the case. Unfortunately, however, much of what we have learned has reinforced a sense that EU citizenship – especially in its 'free movement guise' – is very much under pressure.[404]

This much is clear from the referendum on immigration quotas that was held in Switzerland as we were writing this General Report. Billed as a citizens' initiative 'Against Mass Immigration', the referendum was targeted against EU free movement, a regime by which Switzerland had been bound through bilateral treaties since 2007. Although the majority of mainstream parties opposed it, the initiative was passed on 9 February 2014 by the required combination of popular and cantonal approval, and commits the Federal Government to work towards the implementation of the initiative within three years. Switzerland immediately withdrew from a transitional arrangement opening its labour market to citizens of Croatia and, meanwhile, the European Commission has indicated that Switzerland is no longer participating as it was previously in research funding programmes such as Horizon 2020 and the student mobility scheme ERASMUS+. This is because under the arrangements between Switzerland and the European Union, a package deal approach is used – Switzerland may not pick and choose and it must accept

404. For a recent assessment from the perspective of political science, see R. Barbulescu, 'EU freedom of movement is coming under increasing pressure in the UK and other European states', LSE EUROPP, 20 February 2014, available at: http://blogs.lse.ac.uk/europpblog/2014/02/20/eu-freedom-of-movement-is-coming-under-increasing-pressure-in-the-uk-and-other-european-states/.

The proceedings of XXVI FIDE Congress in Copenhagen in 2014 are published in three volumes, where this book concerns: Union Citizenship: Development, Impact and Challenges.

The three editors, Professor and President of FIDE, Ulla Neergaard, Associate Professor and Secretary General of FIDE, Catherine Jacqueson, and Commissioner in EU Law and Human Rights, Nina Holst Christensen, are all distinguished experts within EU law. The Joint General Rapporteurs, Professors Jo Shaw and Niamh Nic Shuibhne, are among the absolute leading scholars within the particular field of Union citizenship in Europe. The Institutional Rapporteur is Michal Meduna from DG Justice of the Commission of the European Union, who has long and acknowledged experience in the area.

Their impressive analyses are contained in this book together with important and valuable studies on the implementation of the relevant EU law in the Member States all over Europe. Thereby, this book hopefully constitutes a goldmine for comparative and EU lawyers in the field of Union citizenship.

DJØF Publishing
ISBN 978-87-574-2923-7